

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UMG RECORDINGS, INC., ET AL, :
Plaintiffs, :
 : Case Number:
vs. : 1:17-CV-00365-DAE
 :
GRANDE COMMUNICATIONS : Austin, Texas
NETWORKS, LLC, ET AL, : October 12, 2022
Defendants. :

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE PLAINTIFFS:

Andrew H. Bart, Esquire
Jacob Tracer, Esquire
Jenner & Block, LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 891-1600; abart@jenner.com

Robert B. Gilmore, Esquire
Philip J. O'Beirne, Esquire
Stein Mitchell Cipollone Beato & Missner LLP
1100 Connecticut Avenue, NW, Suite 1100
Washington, DC 20036
(202) 601-1589; rgilmore@steinmitchell.com

Paige Arnette Amstutz, Esquire
Scott, Douglass & McConnico, LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300; pamstutz@scottdoug.com

1 FOR THE DEFENDANTS:

2 **Richard L. Brophy, Esquire**
3 **Zachary C. Howenstine, Esquire**
4 **Mark A. Thomas, Esquire**
5 **Margaret R. Szewczyk, Esquire**
6 Armstrong Teasdale, LLP
7 7700 Forsyth Boulevard, Suite 1800
8 St. Louis, Missouri 63105
9 (314) 621-5070
10 rbrophy@armstrongteasdale.com
11 zhowenstine@armstrongteasdale.com
12 mathomas@atllp.com
13 mszewczyk@armstrongteasdale.com
14
15
16
17
18
19

20 COURT REPORTER:

21 Angela M. Hailey, CSR, CRR, RPR, RMR
22 Official Court Reporter, U.S.D.C.
23 262 West Nueva Street
24 San Antonio, Texas 78207
25 Phone (210) 244-5048
angela_hailey@txwd.uscourts.gov

24 Proceedings reported by stenotype, transcript produced by
25 computer-aided transcription.

I N D E X**OPENING STATEMENTS****PAGE**

By Mr. Bart

47

By Mr. Brophy

77

WITNESSES:**JEFF WALKER**

By Mr. Bart

117

By Mr. Howenstine

163

WADE LEAK

By Mr. Bart

175

By Mr. Howenstine

183

JEREMY LANDIS

By Mr. Tracer

189

By Mr. Howenstine

213

1 (Wednesday, October 12, 2022, 8:27 a.m., in open court.)

2 * * *

3 COURT SECURITY OFFICER: All rise.

4 COURTROOM DEPUTY CLERK: 1:17-CV-365, UMG Recordings,
5 Incorporated, et. al, versus Grande Communications.

6 THE COURT: Can we have just appearances of those who
7 are going to be arguing right now.

8 MR. BART: Thank you, Your Honor. Andrew Bart from
9 Jenner & Block and Robert Gilmore from Stein Mitchell for the
10 plaintiffs.

11 MR. BROPHY: Good morning, Your Honor. Richard Brophy
12 with Armstrong Teasdale on behalf of Grande.

13 THE COURT: All right. Okay. What are the issues?
14 What are your many issues?

15 MR. BART: There are a number of issues, but the first
16 one that I want to address, if I may, is going back to the
17 second motion for reconsideration that was made yesterday on
18 the DMCA where Your Honor --

19 THE COURT: Not back to that again.

20 MR. BART: Well, the only reason I was going back to
21 that again is, as you remember, one of the arguments that I
22 made to you was that they're going to make equitable arguments
23 that require us to introduce the DCMA as a way of responding to
24 those arguments. And certainly the demonstratives that were
25 produced indicate certain questions like Can Grande investigate

1 or verify Rightscorp's accusations, a series of various
2 Internet sites with Grande just being an intermediary in the
3 middle, did Grande really act like an apprentice with a caption
4 saying Grande did what it could, all of which imply that there
5 was no other alternative available to Grande and that this is
6 all that was available to them.

7 And I think it's really critical for us to be able to
8 advise the jury, particularly since the goal here on the part
9 of the defendant is to basically take everything else out of
10 the case except for Rightscorp and just present facts, to let
11 them know that this pattern of ignoring infringements was done
12 in a structure where they could have gotten the safe harbor and
13 that the safe harbor would have avoided these types of claims.

14 And I said when we were arguing about this yesterday
15 that, in fact, in the motion on the DCMA, they made those
16 equitable arguments. And in the voir dire selections on
17 Friday, they made those equitable arguments, and there was a
18 representation that there wouldn't be any, but I think that
19 it's still a theme in their overall presentation that we were
20 an innocent bystander, we were in the middle, we did what we
21 could, what do you expect from us.

22 And I don't see how we can be expected to allow that
23 argument to be presented repeatedly to the jury without
24 advising them that there was another way that the ISPs could be
25 a passive intermediary, just pass on the notices, keep tabs on

1 who was infringing repeatedly and terminate people as the law
2 requires.

3 THE COURT: Well, look, it seems to me that if counsel
4 makes the argument that they were just an intermediary, they
5 had no control over this, this isn't their concern, they did
6 everything they could, I don't know, it's been a very long time
7 since I've tried a lawsuit, but I would think that if I were
8 opposing counsel on these facts -- and I'm not giving you any
9 argument you don't already know about -- I always worry about
10 that with inexperienced lawyers, but you're no inexperienced
11 lawyer. I would be arguing, wait a minute. They could have
12 done something about it and, in fact, they did do something
13 about it.

14 MR. BART: Well, certainly --

15 THE COURT: And you don't even need to get into, you
16 know -- I mean, from the early 2000s until 2010, they
17 monitored, they stopped, and they -- but then, in 2010, your
18 argument would go on about how they put profit ahead of -- you
19 know...

20 MR. BART: Absolutely, Your Honor.

21 THE COURT: And that to me seems like the argument
22 that you would make. Now, maybe I'm crazy.

23 MR. BART: No, but there's another piece to this,
24 which is there's a unique little window here because it wasn't
25 just that they had a policy before 2010. They also had a

1 policy starting in 2017, and they posted it on their website,
2 and it specifically provides, we are obligated under federal
3 law, and it recites the language of the DCMA repeat infringer
4 provision. They're objecting to that as one of our exhibits
5 here, even though it's their own document, and it's been
6 stipulated to as to authenticity.

7 I think at an absolute minimum I need to be able to
8 point that out and to point out they thought it was okay here,
9 they thought it was okay here, here is that point in the
10 middle. So even if Your Honor wants --

11 THE COURT: Where did they post this?

12 MR. BART: On the website.

13 THE COURT: They put it on the website?

14 MR. BART: Yes, they absolutely --

15 THE COURT: Public website?

16 MR. BART: Publish website, absolutely.

17 THE COURT: Okay. Let me hear from counsel.

18 MR. BROPHY: Your Honor, I'll try to take those in
19 order. The slides that my colleague referenced regarding --

20 THE COURT: Well, let's make sure we're talking about
21 the same thing here because, you know, it can get a little
22 confusing. Not just for me, but at some point, I'm sure, an
23 Appellate Court is going to be looking at this, and they need
24 to know what you're talking about. As somebody who sits four
25 times a year on the Ninth Circuit and goes over those records,

1 I can tell you it's not easy to follow sometimes.

2 MR. BROPHY: Understood.

3 THE COURT: So what are you talking about now? Not
4 just his arguments. What argument specifically?

5 MR. BROPHY: I'd like to address first the suggestion
6 that we are making equitable arguments to the Court. We are
7 not going to do that. Our arguments are directed at the
8 knowledge element of this claim. Because this is a
9 contributory copyright infringement claim --

10 THE COURT: Yes.

11 MR. BROPHY: -- not only do they have to prove the
12 underlying copyright infringement occurred, but they have to
13 prove that we, among other things, knew about it.

14 THE COURT: Of course.

15 MR. BROPHY: And when we say things like, we're just
16 an intermediary, it's because we're passing packets back and
17 forth, and we don't know what the packets have in them, and so
18 it directly relates to knowledge. That's what we're arguing
19 about. Do I have you with me so far?

20 THE COURT: Well, you do, but -- well, I'll leave that
21 for the jury.

22 MR. BROPHY: Just to preview my opening ever so
23 slightly here, there is a distinction between an accusation and
24 knowing something is true.

25 THE COURT: Sure.

1 MR. BROPHY: And this case is about accusations we
2 received. And one of our defenses is that we didn't know
3 whether they were true or not.

4 THE COURT: Right.

5 MR. BROPHY: And had no way of determining whether
6 they were true or not, because --

7 THE COURT: Okay. To be honest with you, I don't have
8 the same problem that plaintiff's counsel does with your
9 exhibit itself because I think there's a very easy,
10 straightforward way of dealing with it, which I've already
11 outlined, which I think is -- well, maybe I'm giving myself too
12 much credit here, but I think it's pretty effective.

13 MR. BROPHY: Your Honor, if I may address that also
14 very briefly. My colleague, Mr. Bart, said -- and I wrote this
15 down exactly as he wrote it, *"They could just terminate people*
16 *as the law requires."* The law does not require us to terminate
17 anyone. The DCMA gives us the option to, but this is exactly
18 the concern that I have about presenting the DCMA in this case
19 is that it confuses the jury in the thinking there's an
20 obligation to terminate when there absolutely is not.

21 THE COURT: Well, the law may not require you to
22 terminate them, but your failure to terminate them is at your
23 own risk, a risk which your client took, which is why you don't
24 have that defense available to you.

25 MR. BROPHY: Correct, but 512(L) states expressly that

1 the fact that we chose not to avail ourselves of that
2 affirmative defense or tried and didn't meet the burden, the
3 hurdle, does not mean that the plaintiffs get to use our
4 failure to adhere to it or our failure to meet the hurdle as
5 affirmative evidence to prove their underlying claim, and
6 that's exactly what they're doing.

7 THE COURT: Well, the fact that you didn't terminate
8 them, however, and you, I think -- and this is pretty clear
9 from our previous rulings, sometimes I say "our" because it was
10 not just me. There was substantial evidence that your client
11 did know what was going on, and that goes to the willful
12 blindness argument, doesn't it?

13 MR. BROPHY: If they had evidence that we knew, then
14 that would go to the knowledge.

15 THE COURT: Well, they have pretty substantial
16 circumstantial evidence that you knew.

17 MR. BROPHY: Well, that's an argument we're going to
18 take up later, I suppose. But for the purposes of this
19 discussion --

20 THE COURT: I mean, I don't know that anybody -- I
21 don't think there's a whistleblower in this trial. Maybe there
22 is.

23 MR. BROPHY: And, Your Honor, the issue here -- I'm
24 sorry. I don't want to waste your time with this, but I think
25 it's important to understand this context.

1 THE COURT: Counsel, let me tell you something. Your
2 being here and my being here is not a waste of my time. All
3 right?

4 MR. BROPHY: Thank you, Your Honor. Thank you.

5 THE COURT: I have an absolute obligation to be here.
6 I have an obligation to listen to you and to make the best
7 rulings I can. That doesn't mean that you have to agree with
8 my rulings.

9 MR. BROPHY: I understand.

10 THE COURT: You know? The very first day I became a
11 federal judge, an old-timey judge that had been a -- well, I
12 guess by the time he died on the bench almost, he had to be
13 taken off the bench and rushed to the hospital, and he died at
14 96. So he literally died on the bench -- told me -- and he was
15 an old -- he came from Kansas, his dad was a rancher. And he
16 said, *"David, something you got to understand about this job.*
17 *Every day half the people that go out of your courtroom are*
18 *going to think you're the front of the horse and the other half*
19 *are going to think you're the rear end."* Okay? I've come to
20 understand that, all right?

21 MR. BROPHY: Yes, Your Honor. I understand.

22 THE COURT: And any judge that's running around trying
23 to make everybody happy with their rulings is the worst judge
24 in any case. There's nothing worse.

25 MR. BROPHY: Agreed.

1 THE COURT: So go ahead and make your arguments, I'll
2 rule, and that's the way we're going to go, and then, you know,
3 we got a great Court of Appeals and they'll look at it. And I
4 got a pretty good record before them, but sometimes I get
5 reversed.

6 MR. BROPHY: The first thing I'll say is -- just to
7 make it crystal clear what our position is -- we're not
8 objecting to the other side arguing about the fact that we
9 didn't terminate anyone during this time period. In fact,
10 we're willing to stipulate to that fact. That's not a dispute.

11 However, there is the fact, the underlying fact, that
12 we didn't terminate anyone, and then there's the gloss of us
13 trying to achieve the safe harbor, or not, or deciding to
14 pursue the safe harbor, or not. And it's that category of
15 arguments that are the problematic ones --

16 THE COURT: Well, I don't know that plaintiff's
17 counsel is going to be arguing to the jury that you tried to
18 achieve safe harbor and didn't make it.

19 MR. BROPHY: Well, they are going to argue that we
20 could have used the safe harbor but chose not to.

21 THE COURT: Well, there's a difference. There's a big
22 difference. And I, personally, at this point have already
23 ruled on that, and I don't think there's a problem with that.
24 And as long as they don't suggest that because -- now, see, the
25 problem with safe harbor is that it doesn't prove liability. I

1 mean, you cannot avail your -- I've had a copyright case,
2 actually. You can avail -- you not avail yourself of the safe
3 harbor and still not have infringed.

4 MR. BROPHY: Right.

5 THE COURT: I mean, you don't have to go into safe
6 harbor in order to win a copyright case.

7 MR. BROPHY: Right. In fact, the Courts of Appeals
8 say that phase one is determining whether there's been a
9 copyright infringement --

10 THE COURT: That's right. You have to --

11 MR. BROPHY: -- and phase two is the DCMA.

12 THE COURT: That's right. Exactly.

13 MR. BROPHY: But we're trying to keep that line
14 crystal clear that --

15 THE COURT: But I even had a case where one of the
16 parties desperately was trying to get themselves into the safe
17 harbor, and it was a jury question in that case. And the jury
18 found that they hadn't done it. They hadn't done enough, but
19 then again they -- but they hadn't violated the copyright,
20 except in one small instance, which didn't make a difference.

21 MR. BROPHY: Just to make sure the record is clear on
22 our position on this, Your Honor, because there's that two-part
23 process, our position is that the case law is clear that part
24 one is determining whether there has been an infringement of
25 copyright --

1 THE COURT: Right.

2 MR. BROPHY: -- and that the DCMA is irrelevant, has
3 no role in that determination whatsoever. It's only relevant
4 to the second step of determining whether the safe harbor
5 applies. And so because the safe harbor, by Your Honor's
6 summary judgment order, does not apply in this case, and we're
7 only adjudicating the underlying copyright infringement
8 question, the DCMA safe harbor shouldn't be uttered in this
9 courtroom. That is our position. I understand that you have a
10 different perspective. I just want to make sure the record is
11 clear.

12 THE COURT: Well, I'm not the only one.

13 Go ahead.

14 MR. BART: Thank you, Your Honor. I think we have
15 some clarity here. I think we are not -- my mention, my
16 proposed mention of the DCMA is going to be, as I said
17 yesterday, within the context of saying, essentially that, that
18 it does not effect the jury's determination of the underlying
19 claim of contributory infringement. However, we are trying
20 more than just the knowledge issue. We are trying willful
21 blindness. We are trying the damages issue. All of this
22 evidence is coming in together, and this is all relevant. And
23 the problem right now is, frankly, let's take it a half step
24 back. Had we not moved for summary judgment on the DCMA, then
25 all of this would come in and Mr. Brophy's argument would be

1 falling on deaf ears.

2 And basically the notion here is, well, you know what,
3 we have a gotcha. You won, and we are not eligible, and so we
4 have a better position in terms of this trial and excluding
5 evidence than if you hadn't won on summary judgment. But the
6 bottom line is that all of this, their awareness of this safe
7 harbor -- and there's tons of evidence that they were aware of
8 it and that they were aware of the fact that they weren't
9 terminating, might affect their statuses for safe harbor is
10 relevant to willfulness, is relevant to willful blindness.

11 Mr. Brophy keeps talking about knowledge as if they
12 have a duty to, in fact, investigate. But what he's really
13 saying is, we don't have to do anything. Because,
14 theoretically, there's a possibility that there might be an
15 error in some of these statements, we can look the other way
16 and just not pay attention to it at all.

17 That is classic willful blindness, as Your Honor
18 pointed out, particularly for a party that knew its obligations
19 before and knew its obligations after. I don't know that we
20 need to really go further with it --

21 THE COURT: Well, I think that it's very important
22 that you stay away from any argument that would suggest to the
23 jury that because they did not avail themselves or were not
24 able to avail themselves of the safe harbor, that that is in
25 some way probative of a copyright infringement --

1 MR. BART: Absolutely. There's no argument.

2 THE COURT: -- because not only will you hear from me,
3 but if there's ultimately an award for your client, the Fifth
4 Circuit would probably take a very dim view of upholding it.

5 MR. BART: I hear you, Your Honor.

6 So the last point --

7 THE COURT: You shoot yourself in the foot even if you
8 get it past me.

9 MR. BART: I think we've all done that from time to
10 time, but the warning is very clear. And as I said, I have no
11 intention of making that statement.

12 But I do want, in terms of the demonstratives, the
13 ability to point out that in 2017, on their website, they put
14 down their DCMA policy and stated it as their obligation to do
15 these things, because just as you said --

16 THE COURT: It is probative, not of the DCMA, not of
17 safe harbor, okay? This is important. It's not probative of
18 safe harbor, all right?

19 MR. BART: Right.

20 THE COURT: What it goes to, however, is willful
21 blindness.

22 MR. BART: Agreed.

23 THE COURT: So, yes, you can.

24 MR. BART: Okay. Thank you, Your Honor. That's all
25 that I'm going to address. Mr. Gilmore will address the other

1 objection.

2 THE COURT: I thought you were done. Why was I
3 dreaming? Go ahead, Mr. Gilmore.

4 MR. GILMORE: Thank you, Your Honor. Robert Gilmore
5 for the plaintiffs. We have objections to one piece of
6 evidence that is replicated in several of defendant's slides.
7 I have a copy of their slides with the pages flagged. May I
8 approach?

9 And for the record, they are -- counsel, I think we
10 told you last night -- slides 37 and 38 and 40 through 44,
11 although defendant's slides didn't have page numbers on them.

12 All of these slides refer to a document that concerns
13 the technical workings and business dealings of an entirely
14 different online detection company, not Rightscorp, different
15 company called MarkMonitor. But the infringement evidence
16 that's going to be presented to the jury in this case is about
17 Rightscorp, not some other company, and the issue of whether --
18 how a whole other system works and what its dealings with the
19 RIAA, that was ruled as not relevant and, therefore, not
20 discoverable by a Magistrate Judge Austin in his ruling from
21 several years ago, ECF 191.

22 THE COURT: They're talking about Rightscorp here.
23 They use the term "Rightscorp."

24 MR. GILMORE: And I think that is why these slides are
25 all the more problematic, because when you look at the slides,

1 you think that the document that they're showing is about
2 Rightscorp, but it's not. They're talking about technical
3 specs of some other company that RIAA hired; different
4 technology for different kinds of services.

5 And so we think that this is going to confuse the jury
6 because we're going to be getting to a trial within a trial.

7 THE COURT: Let me hear from opposing counsel. Is
8 that true, you're using a different company, not Rightscorp,
9 but calling it Rightscorp?

10 MR. BROPHY: No, that's not true at all, and not what
11 I intend to do.

12 THE COURT: Are we in the same courtroom here? Have
13 you been litigating together for several years? I mean, how
14 can we have this misunderstanding?

15 MR. BROPHY: I'm not sure, Your Honor. I didn't
16 communicate that at any time. The document that we wish to use
17 is a contract that exists between the RIAA, which is the
18 industry body for the record labels --

19 THE COURT: That's right.

20 MR. BROPHY: -- in MarkMonitor, a different company
21 from Rightscorp.

22 THE COURT: Okay.

23 MR. BROPHY: However, this contract sets forth the
24 industry standard requirements for collecting and storing
25 evidence before accusing someone of music sharing.

1 THE COURT: Wait a minute. Did Rightscorp execute a
2 similar agreement?

3 MR. BROPHY: Your Honor, Rightscorp never worked with
4 the record labels. There is no equivalent agreement for
5 Rightscorp. One of our arguments in this case --

6 THE COURT: Why is it relevant?

7 MR. BROPHY: Because the RIAA is the industry body for
8 the record labels.

9 THE COURT: Okay.

10 MR. BROPHY: They established a standard for what is
11 required to be collected and stored to prove that an e-mail
12 accusation of infringement of music sharing is legitimate.
13 This document we want to use is the industry standard. It's
14 the RIAA's own articulation of what is necessary to be
15 collected and saved to legitimize an e-mail accusing someone of
16 music sharing.

17 We want to bring up documented -- not to talk about
18 how MarkMonitor works but, rather, to talk about what the RIAA
19 requires to be detected, collected, and saved before accusing
20 someone of music sharing.

21 The reason this is important is, one of our arguments
22 in this case is that Rightscorp didn't save these things, and
23 therefore, Rightscorp's e-mail accusations are not legitimate.
24 They don't meet the industry standard.

25 THE COURT: Well, was Rightscorp bound to do that? In

1 any way?

2 MR. BROPHY: Rightscorp was never hired by the record
3 labels.

4 THE COURT: Is this a voluntary type of agreement or
5 is this -- this is certainly not a law.

6 MR. BROPHY: It's not law, Your Honor, but this is
7 the -- how do I describe this? Shortly before filing this
8 lawsuit --

9 THE COURT: Okay.

10 MR. BROPHY: -- the record labels purchased a bulk set
11 of e-mails from Rightscorp, okay? The record labels never
12 hired Rightscorp to do work on their behalf, never hired them
13 to do monitor songs or send e-mails. The record labels bought
14 this data, and they're now trying to pass it off to the jury as
15 legitimate evidence of music sharing.

16 One of our arguments in this case is it is not
17 legitimate evidence of music sharing because even though the
18 record labels want to tell the jury in court that Rightscorp
19 did the right things, we have documents showing the record
20 labels think other things are the right things, not these, and
21 so we're going to argue what Rightscorp did wasn't appropriate
22 to detect music sharing, and they don't have the evidence to
23 prove these songs were shared.

24 THE COURT: You know, this sounds very much to me like
25 a scenario which I have seen and faced in maritime cases. As

1 you know, the Coast Guard has a very voluminous series of
2 requirements in order for a passenger ship -- actually any
3 ship -- to sale.

4 Let's talk about passenger vessels for a moment. And
5 they're very detailed, they're very comprehensive, and they are
6 law, and they are binding. Okay? So you violate -- most of
7 these are law, most of these. You violate them, you're in
8 trouble, big trouble. But there are also associations that
9 many of these shipping companies belong to that have their own
10 codes of -- I don't want to say conduct, but codes of sailing
11 that describe the various things that should be done in order
12 to safely sail.

13 And, you know, you could -- actually, if you think
14 back for just a little bit to COVID, which we're I guess still
15 in to a degree, with passenger vessels, we had the CDC putting
16 out what were binding regulations, but the passenger vessel
17 association also had their own regulations that those who
18 signed up adhered to, right?

19 Now, if they chose not to adhere to the regulations or
20 the guidelines by their own passenger vessel, that would not be
21 evidence that they have somehow violated safety regulations put
22 out by the CDC, which were in many cases actually less
23 stringent. For instance, around masking and vax and all of
24 that kind of thing.

25 So it seems to me like what we have here is we have

1 what the law is, the copyright law, and then we have some
2 association, RIAA, which isn't a governmental body, and they
3 put out their own little regulations, their own little set of
4 standards, I guess you might call them. And how are those
5 standards in any way binding on anyone as a matter of law?

6 MR. BROPHY: So the copyright law doesn't articulate
7 what evidence needs to be collected and saved before you accuse
8 someone of sharing music.

9 THE COURT: That's right.

10 MR. BROPHY: And so we are left -- the jury is going
11 to be deciding whether the evidence that they can present is
12 sufficient, and we get to bring in -- I would like to bring
13 in -- evidence that is directly relevant to that fact. And
14 from my perspective, what we're talking about here is a Rule
15 401 question. And I can't fathom a way in which the
16 plaintiff's own position on what is necessary to collect and
17 save to evidence an instance of music sharing is not probative
18 of the issue of whether Rightscorp's process of collecting and
19 saving was sufficient or not.

20 I mean, they're going to tell the jury what Rightscorp
21 did was good enough when their own documents and protocol says
22 something else. And we should be able to bring that in and say
23 this is a mismatch, and the jury should be able to consider
24 whether the fact that --

25 THE COURT: At the very least, I am not inclined to

1 let some agreement between RIAA and some third-party company
2 that's not involved in this case come into evidence. It's more
3 confusing than it is probative. However, I do not have a
4 problem if there is an industry-wide accepted standard that
5 comes directly from the RIAA for which these parties, the
6 plaintiffs, ascribe to be brought in as some evidence, as long
7 as it's properly argued. I mean, you can't argue that they
8 were bound by it.

9 MR. BROPHY: I didn't intend to do that, Your Honor.
10 But to be clear, there is no separate document that promulgates
11 this other than the --

12 THE COURT: Well, where does it come from? Did they
13 just work it out on a case-by-case basis?

14 MR. BROPHY: They --

15 THE COURT: We'll just grab one contract because it's
16 got some in there?

17 MR. BROPHY: There is a single set of contracts with
18 this company, MarkMonitor, and the record labels, in
19 conjunction with the RIAA, establish this set of requirements,
20 and those are embodied within the contract. And every single
21 record label that is --

22 THE COURT: Well, where did they embody these
23 requirements? They must be laid out somewhere in the RIAA.

24 MR. BROPHY: They're in the contracts, Your Honor.
25 That's where they exist. And to be clear, I don't intend to

1 talk about --

2 THE COURT: I'm still having a very hard time
3 understanding how this works.

4 MR. BROPHY: I'll try to frame it a little bit. The
5 RIAA contracted with a company named MarkMonitor to detect
6 music sharing on the Internet.

7 THE COURT: Sure.

8 MR. BROPHY: And in that contract, the RIAA requires
9 that certain evidence be detected and saved as part of the
10 process of establishing an evidence package, as they call it,
11 for purposes of legitimizing accusations of music sharing that
12 they subsequently make.

13 THE COURT: Now, what evidence do you have that the
14 plaintiffs in this case either, number one, knew about it or
15 were, number two, bound by it?

16 MR. BROPHY: The record labels rely on the RIAA to
17 engage in copyright infringement enforcement, and the record
18 labels basically give the RIAA that power to do that. And on
19 top of that, MarkMonitor monitors all of their copyrights, all
20 the record labels' copyrights, pursuant to this requirement
21 that the RIAA promulgated. So we have the RIAA promulgating a
22 standard that all of these record labels in this lawsuit signed
23 up for when they asked MarkMonitor to do this process for them.

24 So this is the record labels agreeing that this is the
25 process they're going to use and they want to use, and we

1 should be allowed to bring in the fact that Rightscorp doesn't
2 meet that standard. They're going to try to argue that
3 Rightscorp's accusations are legitimate. We have the right to
4 undermine that position. And one of the ways to do that is to
5 say the plaintiffs don't even think this is the right way to do
6 it because they require it to be done a different way.

7 And if I may, Your Honor, this issue came up in the
8 motions in limine, and Your Honor entered an order indicating
9 that *The Court shall allow Grande to point to the industry --*
10 *the standard industry policies on infringement notices.*

11 This is a standard industry policy.

12 THE COURT: That's what I'm trying to get at, but
13 you're telling me that there is no standard policy, that this
14 is -- because that's just exactly what I asked you. Where is
15 this standard policy promulgated? And your only answer to me
16 is, well, it happens to be in this particular contract.

17 MR. BROPHY: There's only one company that monitors
18 all the music for all the record labels. The RIAA, the
19 recording industry body, works with one company, and so the
20 contract with that one company is the standard, because every
21 record label uses the RIAA to do its policing, and the RIAA
22 uses MarkMonitor. So there is a one-to-one correlation between
23 what the RIAA requires and what the record labels believe is
24 appropriate.

25 THE COURT: Well, look --

1 MR. BROPHY: May I make two more? I'm sorry, Your
2 Honor. This is an important document. It's a very important
3 issue. May I make just two more points on that, if you don't
4 mind?

5 THE COURT: Yes.

6 MR. BROPHY: Point number one is in addition to just
7 having this document and believing it is highly relevant to
8 this case, our expert relied on this document. He looked at
9 it. He agreed that it is an industry standard. He opined, he
10 offered opinions in his expert report, based on this document.
11 The plaintiffs deposed him. He opined in that deposition about
12 this document, and they did not move to strike his expert
13 report. They did not move to Daubert him on this basis. So we
14 have an expert trying to present opinions that are informed
15 by -- largely by this document, and so to say that it's not
16 relevant and that it's not admissible when our expert relies on
17 it to establish a standard and they didn't even object to it
18 is, in my mind, problematic.

19 The other point I would like to make is it is not the
20 case that Rightscorp is the only noticed company at issue in
21 this litigation. During this trial, the plaintiffs are going
22 to introduce evidenced related to a wide variety of other
23 notification companies. The reason for this is simple. You've
24 heard they want to talk about what we did or didn't do with
25 notices in 2010. Rightscorp didn't exist in 2010. That

1 argument that they're going to make is based exclusively on
2 notices sent from other companies.

3 They're also going to want to introduce e-mails into
4 this case where our internal folks react to notices received
5 from other companies. There are tons of instances in which
6 their expert is going to opine on the entire body of notices
7 that Grande received, not the subset from Rightscorp, but all
8 the notices that we've received from every notification
9 company. So this notion that we've tied a tidy box around
10 Rightscorp is a fallacy.

11 There are other notices coming into this case, because
12 they're going to introduce them, and so the notion that they
13 get to do that, but then we can't bring in one document that
14 says MarkMonitor -- even though we're not going to use it to
15 talk about what MarkMonitor does, but only to say what the
16 record labels require, frankly, is absurd in my mind. We have
17 to be able to do that. Those are my points.

18 MR. GILMORE: May I be heard? I'll be brief, Your
19 Honor.

20 THE COURT: Yes. The famous last words.

21 MR. GILMORE: As soon as I said that. If Grande had a
22 policies document, if Grande had the RIAA issue, here are the
23 standards that any online detection company needs to abide by,
24 that would be the exhibit on the list. They don't have that
25 because that doesn't exist because that is not what happened.

1 Instead, MarkMonitor made a proposal to the RIAA,
2 different company, said, here is our technology, here are the
3 specifics of how it works. RIAA decided to hire MarkMonitor
4 and entered into an agreement. Those two documents, here is
5 how MarkMonitor's technology works, and here is the agreement
6 requiring MarkMonitor to do the things that MarkMonitor's
7 specific technology can do. Those are the two documents, the
8 only two documents.

9 And now counsel is trying to turn that into a industry
10 standard. There is no evidence that that is an industry
11 standard, because there are other companies out there like
12 Rightscorp that have been hired by many other companies,
13 content copyright holders, to do the same work. The reason why
14 the various specs are discussed in these two documents about
15 MarkMonitor is because that's how MarkMonitor does its system.

16 And so now they're going to try and compare two
17 different technologies, one of which there's no evidence.
18 There's not a MarkMonitor witness. There's not an expert
19 witness who is going to be testifying about MarkMonitor in this
20 case. And so they want to turn that into an industry standard
21 when that's not what it is. It's a contract, a statement of
22 work, about a different company, and there's just no evidence
23 that that reflects some kind of industry standard as to how
24 online detection is supposed to happen.

25 And the extent -- I mean, we've heard that's what they

1 want to argue, and I think that is -- it's a 402 and 403
2 problem. The jury is going to be confused if they hear all of
3 this discussion about a completely other company and they
4 think, oh, well, that's what Rightscorp was supposed to have
5 done, when the discussion is about a different company,
6 different kind of technology, and it's going to engender a
7 trial within the trial. Oh, no, that's actually not what
8 MarkMonitor does. Oh, well, Rightscorp could do that.

9 That's what -- we shouldn't be here. It is true the
10 fact that there are other detection companies and the fact that
11 Grande received notices from many other companies, that's a
12 fact. Both sides, I'm sure, are going to talk about that.
13 That has nothing to do with delving into the technology of an
14 entirely different company and trying to say that that is an
15 industry standard, which you just heard that is what Grande
16 wants to do. That's not appropriate.

17 THE COURT: So, no, absolutely not. We are -- at some
18 point we have to stop playing tennis here, knocking the ball
19 back and forth.

20 With respect to the defendant's use of this so-called
21 list of requirements, if we might put it that way, I am going
22 to permit the defendant to use that, just like I would permit
23 them to use any other witness that they might be able to
24 produce who would have, in their view, an expert, for instance,
25 what the plaintiffs should have done or why Rightscorp's

1 processes are ineffective or did not properly do, if you will,
2 a due diligence on these various acts of infringement.

3 On the other hand, I will never permit in this trial
4 any suggestion by the defendant that this is some sort of
5 standard or industry standard that must be adhered to by the
6 record companies because the plaintiff has -- other than an
7 expert who might opine that he thinks that this is an industry
8 standard, which is a factual matter, which can be addressed by
9 cross-examination, there will be no discussion by the defendant
10 that this is somehow a binding industry standard that
11 Rightscorp violated and therefore was not diligent in what they
12 were doing in identifying these infringements.

13 Do we understand where we are? So they can put the
14 document in. I don't have a problem with that, but it has to
15 be scrubbed to the extent that it's -- there is a suggestion
16 there that somehow this is an industry standard, because it's
17 pretty clear to me that it isn't an industry standard, that it
18 is a -- if I understand correctly -- an agreement reached
19 between the RIAA and its participants and this company, and the
20 company said, this is what we are going to be looking at, this
21 is what should be the appropriate measures and steps that need
22 to be taken. And the RIAA said, yeah, that's fine.

23 That doesn't make it an industry standard.

24 MR. BROPHY: Your Honor, may I ask one point of
25 clarification just to make sure -- I do not want to run afoul

1 of your requirements.

2 THE COURT: I would hope not, because, you know,
3 sometimes you can argue yourself out of a position.

4 MR. BROPHY: I understand. And I don't want to do
5 that. I will absolutely not be saying that this is some kind
6 of binding industry standard. I would like to be able to
7 say -- we would like to argue that this is an industry
8 standard -- and they can present evidence that it isn't -- but
9 you don't want me to even say it's an industry standard?

10 THE COURT: No, because it isn't an industry standard.
11 I asked you if you had any documents from the RIAA. No. What
12 is this? Well, this is actually just a one-time contract
13 between the RIAA and this company, and this is what they have
14 agreed to do. That is not an industry standard.

15 MR. BROPHY: They have said in the previous Cox trial
16 that it is the gold standard. Their attorneys stood up in
17 front of the jury and said this is the gold standard.

18 THE COURT: Okay. I don't know anything about that.
19 I wasn't at the Cox trial.

20 MR. BROPHY: I understand. My point is that from our
21 perspective, we should be permitted to argue that it's the
22 standard, and if they disagree, they can say that it isn't.

23 The concern I heard you articulating was us suggesting
24 it's binding or that by not meeting that standard, Rightscorp
25 was violating some regulation or was -- you know, something

1 like that. We don't intend to do that at all. I would like to
2 be able to take the position it's a standard. Our experts have
3 opined it is a standard, and they haven't sought to exclude
4 that testimony or Daubert it out.

5 THE COURT: Look, you know, your expert can testify as
6 to their opinion, okay?

7 MR. BROPHY: Understood.

8 THE COURT: Their opinion.

9 MR. BROPHY: Yes.

10 THE COURT: But they cannot say that this is a binding
11 standard in the industry, because it isn't.

12 MR. BROPHY: I completely agree, Your Honor. We
13 weren't intending to do that, and we won't do that.

14 THE COURT: I mean, it isn't.

15 MR. BROPHY: Understood.

16 THE COURT: Any more than the -- I forget what the
17 name of this cruise ship association that all these cruise
18 lines belong to. They promulgate rules, and if you're part of
19 that cruise line association, like all the major lines are,
20 then you follow them if you feel like they're appropriate. But
21 if you don't, the Coast Guard isn't going to come and stop you
22 from sailing --

23 MR. BROPHY: Correct.

24 THE COURT: -- because you violated the CDC. And, in
25 fact, some cruise lines, before the association had agreed to

1 it, went ahead and removed the mask mandates and vaccination
2 requirements. One of them is Viking. I know that because I'm
3 on a Viking cruise. Hopefully.

4 MR. BROPHY: If this trial is over by then, right?

5 THE COURT: Yeah, that's right. That's at
6 Christmastime. We better be done.

7 MR. BROPHY: Thank you for the clarification.

8 THE COURT: All right. So you can -- if you put the
9 right foundation in, you can put it in as evidence.

10 MR. BROPHY: Thank you, Your Honor.

11 THE COURT: So I'll consider that an objection, and
12 the objection is partly sustained and partly overruled.
13 Because I'm sustaining it to the extent that they cannot
14 present this as an industry standard. I'm overruling it to the
15 extent that they should be able to, as part of their defense to
16 the argument that they were willfully blind here, present
17 evidence that the -- evidence that you're showing which alleges
18 that they were willfully blind is not adequate. Okay? Does
19 that make any sense at all?

20 MR. GILMORE: It does. And we appreciate that ruling.
21 Thank you, Your Honor.

22 MR. BROPHY: Your Honor, there is one extremely small
23 last item if I may pass some slides to you. The only question
24 is whether you're going to allow the plaintiffs to instruct the
25 jury on the law during the opening. I have some slides that

1 indicate that they're going to be identifying elements and
2 burdens of proof. Does Your Honor want that or not?

3 THE COURT: No, no. We can't instruct them on the
4 law. You can tell them what -- you can tell them what you are
5 attempting to prove. There's a difference.

6 MR. BART: Okay. I hear you. I mean, the standards
7 are not even in debate. The jury -- one of them, for example,
8 is the standard on preponderance of the evidence. They have
9 the same standard as we do, and the jury has already been
10 instructed. The other is on statutory damages. They have a
11 jury instruction with a list of --

12 THE COURT: I don't have your thing in front of me,
13 so -- at this point, I don't want to see it. Just tell me.
14 Okay?

15 MR. BART: Okay. Fair enough. So --

16 THE COURT: We'll never get this trial started.

17 MR. BART: I apologize. I do feel the need to respond
18 to --

19 THE COURT: I don't have a problem with you
20 responding.

21 MR. BART: Okay. Thank you, Your Honor. I think that
22 we're not instructing the jury. We're telling the jury what
23 the issues are and what the standards are going to be from
24 undisputed statements either of the Court or undisputed issues
25 as between us. So it is completely correct that I can't argue

1 a disputed issue of law to the jury. I would certainly never
2 try to do that, but if I'm just simply saying as, frankly, I've
3 seen done a million times, this is not a criminal case. This
4 is a civil case, and so you only need to prove a preponderance
5 of the evidence that --

6 THE COURT: I don't have a problem with that.

7 MR. BART: Okay. And another one is, you know, they
8 are going to be talking about the amount of damages, but we
9 have statutory damages.

10 THE COURT: You don't have in your opening statement,
11 here are the elements of this claim, do you?

12 MR. BART: No. I don't list them one, two, three,
13 four, five. Actually, let me back up. I was talking about --

14 THE COURT: Because that is my province.

15 MR. BART: Okay. No. I understand that. Okay.
16 Well, I can work around that. I think that with regard to --

17 THE COURT: Because we may have some disagreements
18 later about that. You know, this is one of the reasons why --
19 I mean, I don't think so, but this is one of the reasons why we
20 don't generally like lawyers to instruct the jury on the law in
21 opening statement because something may happen during the trial
22 that removes something or adds something and, you know, if you
23 go from Circuit to Circuit to Circuit, the pattern jury
24 instructions sometimes are quite different depending upon the
25 Circuit's ruling with respect to issues.

1 MR. BART: Right. But what I'm instructing -- not
2 instructing. That's the wrong word. What I'm talking to the
3 jury about --

4 THE COURT: A Freudian slip, counsel.

5 MR. BART: Perhaps. Please don't hold it against me,
6 but it's out there.

7 THE COURT: You don't want to be in my job, counsel.
8 You'd be making a lot less money.

9 MR. BART: I don't want your job.

10 But, you know, I think with regard to the underlying
11 claim here, we need to be able to tell the jury that this is a
12 claim for contributory copyright infringement.

13 THE COURT: Yes.

14 MR. BART: That Judge Ezra will instruct you on the
15 law on that subject.

16 THE COURT: Right.

17 MR. BART: But that we are going to prove that they
18 had knowledge, that they materially contributed to it, and that
19 there was actual infringement by the underlying user, because
20 that is what our proof is going to show.

21 This also happens to be the standard that was set
22 forth in Your Honor's summary judgment's decision, so I don't
23 think that I'm going on to --

24 THE COURT: I don't have a problem with any of that.

25 MR. BART: Okay. Fair enough.

1 THE COURT: Unless there is a suggestion that what
2 he's saying is misstating the law.

3 MR. BROPHY: Your Honor, this is a slide right here.
4 *"Plaintiffs will prove contributory copyright infringement,"*
5 colon, and then a set of three elements, one of which we
6 vehemently oppose. He's providing instruction to the jury on
7 what the law of contributory infringement is. And then we're
8 going to see a statutory damages slide with a cherry-picked set
9 of elements to consider for statutory damages.

10 THE COURT: You may be right, counsel, on all of
11 those, and I may ultimately agree with you, but at this point
12 in time, I'm not in a position -- not having heard any of the
13 evidence, I have a pretty good idea what it's going to be
14 because of all the motions in this case.

15 MR. BART: Well, exactly. They're trying another
16 motion for reconsideration on the issue of whether material
17 contributions --

18 THE COURT: Well, they may win and they may not win.
19 They've won a few and they've lost a few in the last few days.

20 MR. BART: Understood. I think we can address the
21 issue.

22 THE COURT: Please stay away from the elements, all
23 right?

24 MR. BART: I do need to be able to say, for example --
25 I will say what we intend to prove as opposed to saying these

1 are the elements of the claim.

2 THE COURT: That's fine. You can say whatever you
3 want to with respect to what you intend to prove.

4 MR. BART: Okay.

5 THE COURT: Just don't list them as elements of the
6 law.

7 MR. BART: Okay. That's fine. But the last one on
8 statutory damages is a tactical move, not a legal disagreement.
9 There's a legal disagreement on the contributory infringement
10 one.

11 THE COURT: Right.

12 MR. BART: They believe that material contribution is
13 not sufficient. They've argued that inducement is required.
14 They're wrong. You have decided that already, but they want to
15 re-argue it.

16 But on the statutory damages, they recite the same
17 factors that we do. They simply don't want the jury to know
18 that they're supposed to consider things like deterrence and
19 circumstances of the infringement, which both sides say and
20 recite in our proposed jury instructions are factors.

21 I am not going to -- I will not list them and instruct
22 the jury, but I do want the ability to say to the jury that in
23 determining statutory damages, which Your Honor will instruct
24 them on, there are a series of factors that go into that, and
25 we are going to attempt to prove that, you know, among the

1 factors will be deterrence and willfulness and things like
2 that.

3 Because, otherwise, we're left in a situation where
4 we're making all of these arguments that are geared towards
5 those factors, and the jury doesn't understand why that's even
6 part of the case. I'm not going to instruct them and give them
7 a list and say --

8 THE COURT: I told you already that you can tell them
9 what you intend to prove.

10 MR. BART: Okay.

11 THE COURT: All right?

12 MR. BART: All right. I'll work within that. Thank
13 you.

14 THE COURT: That's the name of the game. I'm going to
15 take just a five-minute recess, give you a chance to use the
16 restroom, and then when we come back, we'll have the jury. You
17 will see me -- I don't know, have I told you why -- we're not
18 on the record.

19 *(Discussion off the record.)*

20 * * *

21 COURT SECURITY OFFICER: All rise for the jury.

22 *(Whereupon the jury enters at 9:38 a.m.)*

23 * * *

24 COURT SECURITY OFFICER: All rise.

25 *(Whereupon the judge enters the courtroom.)*

1 THE COURT: Please be seated. All right. Can you
2 call the case.

3 COURTROOM DEPUTY CLERK: Austin, 17-CV-365, UMG
4 Recordings, Incorporated, et. al, versus Grande Communications.

5 THE COURT: All right. And can counsel make their
6 appearances before the jury, please.

7 MR. BART: Yes. Good morning, members of the jury.
8 My name is Andrew Bart from Jenner & Block with my whole trial
9 team on behalf of the plaintiffs.

10 MR. BROPHY: Good morning, members of the jury. My
11 name is Richard Brophy. I'm here on behalf of Grande
12 Communications along with my team, and I would like to point
13 out Mr. Lamar Horton will be our client's representative for
14 the duration of the trial.

15 Thank you, Your Honor.

16 THE COURT: Thank you. And good morning, ladies and
17 gentlemen. You haven't seen me before. One of our magistrate
18 judges, Judge Howell, was kind enough to participate and do the
19 jury selection so that I could do some additional other work.
20 We're very, very stretched, to say the least, because we don't
21 have enough judges, Article III federal judges, who can do
22 criminal cases. Magistrate judges cannot do felony cases, and
23 so I have to -- me and my colleagues -- there's only two active
24 judges here in Austin, and so I split my time between Austin
25 and San Antonio. And I have a chambers and an office in both

1 places. And so I'm running back and forth all the time.

2 Now, I'm going to be the presiding judge during this
3 trial. You have already heard that this trial involves music
4 copyrights, and you're going to hear a lot more about that from
5 counsel when they address you. They will begin this morning by
6 making what we refer to as an opening statement.

7 I believe that the jury has already gotten the
8 preliminary jury instructions.

9 LAW CLERK: Up to the rule, yeah.

10 THE COURT: Okay. So normally I do that, but Judge
11 Howell did it. So good. I won't make you do it again.

12 So this is the lawyer's opportunity to tell you what
13 they believe the evidence will show. At the end of the trial,
14 they have another opportunity to address you directly. And at
15 that time they will give what we call in the West, argument.
16 What they used to call, at least in the East Coast, summation.
17 And that is their opportunity to tell you what they believe the
18 evidence has shown and to point out items of evidence which
19 they think are particularly important and to try to convince
20 you that their side is the correct side in this legal dispute.

21 Now, it's very important for you to understand that
22 attorneys have an obligation. And, in fact, they have two
23 significant obligations. Number one, they are advocates for
24 their respective clients, so they are not here as mediators or
25 someone in the middle, okay? In fact, if they were acting that

1 way, they would be violating their oath. They are representing
2 their client, okay? That is what their job is.

3 They are also officers of the court, just as I am,
4 which means that they have a duty and responsibility to uphold
5 the rules and ethics of the court, and so they have two
6 obligations.

7 My job is to be the trial judge. And as the trial
8 judge, I take absolutely no position whatsoever on the merits
9 of this case. And it is incredibly important that you
10 understand that nothing I do or say during this trial should
11 ever be misinterpreted as my views of how you should vote in
12 your jury deliberations or how the outcome of this case should
13 resolve itself.

14 Now, there will be times, as there always is, when I
15 may have what appears to you to be a disagreement with an
16 attorney during the course of this trial. I will tell you that
17 I was a trial lawyer at one time, and I tried cases in federal
18 court, and I did not always agree with the rulings of the
19 judge. So it may be that it appears to you that there may be
20 some back and forth between myself and one or more of the
21 attorneys. That's part of the process, okay? We all
22 understand that. And as long as we're respectful to each
23 other, that is the name of the game, so to speak.

24 They have the responsibility to advocate to me their
25 client's view of things, and I may or may not agree with it.

1 That does not under any circumstances mean that I dislike the
2 lawyer, that I have any view of the lawyer's competence. The
3 lawyers in this case are very competent, I can tell you from
4 their reputations. And I certainly am not trying to telegraph
5 to you what I think you should do as a jury.

6 Now, from time to time a lawyer may ask for a
7 sidebar -- and Judge Howell may have covered this with you, but
8 it's very important for you to understand that when they do,
9 it's probably because they want to ask a question that they're
10 not sure I'm going to permit. Or they believe the other side
11 has done that. And I may or may not grant a request for a
12 sidebar. Sidebar just means they come over here and talk to me
13 out of your hearing, okay? That's kind of the sidebar of the
14 bench. We want to be sure that we get the law right.

15 Now, if it's going to be a long process, I'll probably
16 send you back so you can relax, so you're not just sitting
17 there waiting. If it's something we can do very quickly, then
18 I'll just leave you there, and we'll go on. I may deny a
19 request for a sidebar because I think we can take this matter
20 up at a recess, okay? And so it is not to be thought of by you
21 as any indication of my view of the case or the lawyer or the
22 outcome of the case. Has nothing to do with it.

23 I have a number of different implements here that I
24 use on the bench. I'm slowly but surely getting into this.
25 I'm one of the few Reagan appointees, Ronald Reagan appointees

1 still on the bench, so I'm kind of from the old era. But I
2 have an iPad that connects -- it's a court iPad, and it
3 connects to the court system, and I also have another device
4 here called a reMarkable where I can make notes, and they also
5 get transmitted to my clerks.

6 When you see me on these things, rest assured that I'm
7 not trying to send you a signal that these are important
8 matters and you better pay attention to it. It may be that
9 I've gotten a communication that one of the lawyers needs to
10 call their office or something of that kind, okay? Nothing
11 like that.

12 Finally, we recess for lunch between 12 and 1:30.
13 Now, I've had jurors say to me, well, Judge, you know, if we
14 only took an hour, then we'd get through the case faster.
15 Actually, not. In my 36 years' experience on the bench, we
16 have found that by giving the lawyers the opportunity to have
17 lunch and prepare themselves for the afternoon, we actually do
18 much better than if we rush them through.

19 Also, because of where we happen to be located here,
20 there's only a few places around here to eat, and so it may be
21 that it's going to take you a little time to walk up and get
22 something to eat and come back, unless you bring your lunch
23 with you, which you are certainly entitled to do. Okay.

24 Now, you're going to see me drinking liquid. I've
25 already explained this to the lawyers. Many years ago I had a

1 very small little vocal cord cancer, which was caught very
2 early, and I'm fine. This was 20 years ago. But they do a
3 radiation on me, and so if I don't keep my vocal cords somewhat
4 moist, I lose my voice, and that's not a good thing for a trial
5 judge. Might be good for the lawyers, but it wouldn't be good
6 for me in getting my job done. Okay?

7 All right. And finally, I want to remind you that we
8 do trial on Tuesday, Wednesday, Thursday and Friday, okay? We
9 don't do trial on Monday. Why is that? Is that another
10 opportunity for a nice three-day weekend for everybody? No.
11 The reason is we are so jammed up because of COVID, we couldn't
12 do anything. We have all these cases and sentencings and all
13 this stuff, that I need time to do that, and the only time I
14 have is Mondays. But this also gives the lawyers an
15 opportunity to, again, prepare, and it also gives you the
16 opportunity, if you wish to take it -- because you won't be
17 paid for jury service on Monday, because you won't be here --
18 to go back to work if you want to. You can go to work on
19 Monday and reconnect with your office or reconnect with your
20 work, whether you work from home or you work in an office,
21 you're not entirely out of sync.

22 Now, what I'm doing here in this case is the standard
23 practice here in the Western District of Texas. Okay? I'm not
24 doing anything unusual. Now, there are a few judges, one judge
25 in particular in San Antonio, that makes the jurors come in

1 super early and then finishes at 3:00. Some of you probably
2 don't live in the downtown Austin area, right? Some of you
3 live far out, kind of? I mean, I don't want my jurors getting
4 up at 3:30 in the morning to get here and then you're -- you
5 know, you're half asleep by 2:00 in the afternoon. It's not a
6 good look.

7 So we're better off starting at 9:00, giving people
8 time to get in. San Antonio is the same. We have people from
9 halfway to Laredo that come in, that have to drive in. Way
10 down in Dilley and, you know, up in the other -- it doesn't
11 work. So I don't know how he does it, but I'm not doing it.

12 All right. If that's it, then we're going to start
13 with the opening statements.

14 The jury has been sworn, right?

15 COURTROOM DEPUTY CLERK: Yes, Judge.

16 THE COURT: I always ask.

17 I am originally from Hawaii. I did go to law school
18 in Texas. I married a woman from Texas 51 years ago, still
19 married. And I love Texas, but I'm from Hawaii, and I was a
20 federal judge in Hawaii for 25 years before I came here, and
21 I've been here ten years helping out. One of the judges went
22 through a two-month trial, and then right before jury
23 deliberation they realized they had forgotten to swear the jury
24 in. Mistrial. They had to start all over again. I saw that,
25 I thought, oh, no. So I always ask. That's not a good thing.

1 All right. Counsel, are you ready?

2 MR. BART: I am, Your Honor.

3 THE COURT: All right. You might want to reintroduce
4 yourself after all --

5 MR. BART: I will, Your Honor. Thank you, Your Honor.

6 And good morning, ladies and gentlemen of the jury.
7 My name is Andy Bart, and it's my honor to be representing the
8 major record labels in the United States, Sony Music, Universal
9 Music, and Warner Music in this very important case for the
10 music industry and the artists that it represents.

11 We appreciate your willingness to serve on this jury
12 and to sacrifice your time to help us reach a just result,
13 which will compensate my clients for the damage that they
14 suffered due to the actions and inactions of the Defendant,
15 Grande Communications.

16 With me on this case are my partner Jake Tracer, three
17 partners from the firm of Stein Mitchell in DC, sitting to my
18 right: Rob Gilmore, Phil O'Beirne, Kevin Attridge, Paige
19 Amstutz from the Austin firm of Scott Douglass & McConnico.
20 And together we'll be presenting evidence, questioning
21 witnesses, introducing documents, and showing brief video clips
22 of depositions that will constitute our case in chief.

23 Also here on behalf of the plaintiff record groups are
24 Scott Bowman from Universal, David Jacoby from Sony, and Tom
25 Monahan from Warner, as well as Jared Freedman from the

1 Recording Industry Association of America, or RIAA, the trade
2 association for the recording industry.

3 As I started to say a moment ago, this case is about
4 the actions and, more importantly, the inactions of the
5 defendant, Grande Communications, in enabling a flood of
6 copyright infringement on its network and then refusing to play
7 a role in stemming that flood.

8 Grande is what's known as an ISP, or Internet service
9 provider. As the name suggests, an ISP provides customers with
10 high-speed broadband Internet service as well as some other
11 services such as TV and cable service. You may know them as a
12 cable company, but whatever it's called, it's a very highly
13 profitable business. And particularly the Internet component
14 of that business.

15 And as you'll hear at trial from their own witnesses,
16 Grande has an amazingly high profit margin on that Internet
17 service of up to 95 percent, a factor that played heavily into
18 many of Grande's worst decisions that resulted in this case.

19 What brings Grande to this court as a defendant is its
20 intentional decision to ignore a massive amount of copyright
21 infringement that it facilitated through this high-speed
22 broadband network; specifically, the illegal copying and
23 distribution of copyrighted song recordings -- sound
24 recordings. As you'll hear during the trial, Grande recognized
25 the importance of addressing this infringement, and for a

1 period of time had a robust policy to deal with it and to deal
2 with subscribers who committed that infringement.

3 However, in 2009, Grande was bought by an out-of-state
4 private equity firm that installed a different company called
5 Atlantic Broadband, or ABB, to manage the company and to
6 provide management and legal support for Grande. And in 2010,
7 ABB decided to revoke that policy. And for the next seven
8 years, the period that's at issue before you today, Grande
9 concededly took no action whatsoever against any subscribers
10 that it knew had committed infringements, and instead continued
11 to provide those subscribers with the very tools they needed to
12 infringe; namely, continued access to Grande's high-speed
13 Internet service.

14 Why would it do that? Grande says it doesn't know
15 because it was a decision made by ABB. Whether you believe
16 that testimony or not, one of the most striking things about
17 this trial is that none of the people who made that decision
18 are going to testify here. But as with many other mysteries,
19 it's always a good idea to follow the money. And as I told you
20 before, Internet service is an extraordinarily profitable
21 business, and over 90 cents out of every dollar in revenue was
22 pure profit. So terminating users who were paying their bills
23 cost Grande and their private equity owners money that they
24 would otherwise be collecting.

25 Unsurprisingly, the owners wanted to boost the profits

1 of the company so that they could flip Grande, sell it, and
2 cash out, which they did handsomely in 2016 to the tune of
3 \$400 million. And beside, they thought they would never get
4 caught.

5 But in 2015, in a case that Grande watched carefully,
6 another cable company was held liable for the infringements
7 committed by its users, and Grande knew that the arguments and
8 evidence that were asserted in that case can also be asserted
9 against Grande. But remarkably, even then it did not address
10 infringement on its network, and it instead continued to
11 provide broadband service to users that it knew were repeat
12 infringers.

13 But after it was sued here in 2017, Grande
14 manufactured a series of excuses and accusations it had never
15 made before, including all of the arguments that you'll hear
16 from them in this case, but those after-the-fact excuses don't
17 change the underlying fact that Grande caused massive damage to
18 the plaintiffs and to the entire music industry and has to be
19 held accountable for that damage.

20 On the other side of the case are the major label
21 groups, Warner, Sony, and Universal, that constitute the bulk
22 of the recording industry in this country. Most of you
23 probably have a sense of what the recording industry is, but at
24 its core, it's a business that finds, invests, develops,
25 markets talent, artists, in order to create the music that

1 enriches all of our lives.

2 And as you'll hear, so much goes into that, making
3 that happen. Finding the artists, investing in their careers,
4 surrounding them with musicians and producers and other
5 resources to develop their musical vision and providing the
6 teams of support to promote and market their creations and
7 paying for all of that. It also requires a willingness to take
8 risks. For the overwhelming majority of the resulting
9 recordings, as much as the labels believe in them, are not
10 commercially successful, so the success of the profitable
11 releases has to pay for the cost of the entire operation.

12 But the result of all that effort, investment, and
13 risk, is profound, and it's felt far beyond the sale of vinyl
14 records or CDs or subscriptions to streaming services. It's
15 the foundation for an entire ecosystem, the career of artists
16 and musicians, producers, engineers, managers, road crews,
17 publicists, and all the others whose lives are based on these
18 creations. And what better place in time to see and appreciate
19 how far-reaching that ecosystem is than to be here now and to
20 be in Austin during Austin City Limits.

21 Everywhere you look you see the power of music. It
22 connects us, it moves us, it inspires us. It's one of the
23 great American industries. In fact, in a way, it is a
24 definition of America, a communal resource based on our
25 diversity in reflecting all the people in this country. Think

1 about your favorite artists and your favorite songs. Think
2 about how much they enrich our lives. In fact, it's almost
3 impossible to imagine life without it.

4 But as you'll hear during this case, this industry
5 that has brought so much pleasure to all of us has been under
6 siege for the last 25 years. Although people are listening to
7 more music now than in any time in the past, the industry has
8 been at a crossroads where its very survival has been an issue.

9 I'm talking about Internet piracy, a concept that
10 you've probably heard of before. The crisis began in the late
11 1990s when free, unauthorized copies of virtually every
12 recording flooded the Internet and ultimately destroyed the
13 business model that had sustained the industry for the past 50
14 years and severely damaged all the artists and others who
15 depended on that industry.

16 When unauthorized music files became readily available
17 online, people stopped buying CDs. Revenues kept going down
18 and down, and there was no clear end in sight. Indeed, between
19 1999 and 2012, the revenues of the industry dropped in half.
20 Stop and think about that for a minute. How many industries
21 survive such a disastrous collapse of its business model? And
22 worse, the widespread availability of pirated music led many
23 people to believe that piracy was a victimless act and that
24 music should be free like air, despite the years of effort,
25 creativity and enormous investment that went into creating this

1 precious resource.

2 The industry tried to fight back. It tried to educate
3 consumers about the investments it made in finding and
4 developing artists, the damage it was suffering from the
5 massive amount of Internet piracy and how critical it was that
6 artists get paid and that labels had a chance to recoup their
7 investments. They tried to create new formats for music like
8 selling digital downloads. And finally, it protected its
9 investments in court and sued the websites that were making the
10 infringing copies available.

11 And after years of effort and millions of expense, the
12 industry was able to shut down most of them, but then piracy
13 just shifted to a different system called peer-to-peer networks
14 where users share the recordings directly with each other
15 rather than downloading them from a central website. So the
16 industry undertook another round of legal actions, and the
17 companies that ran those networks ultimately -- and you've
18 heard of many of them, Napster, Grokster, LimeWire, were
19 ultimately shut down after more -- millions and millions in
20 costs and years of effort.

21 But you can probably guess what happened next. Piracy
22 morphed yet one more time into a more sophisticated form of
23 peer-to-peer piracy where there was no central company in the
24 middle. Now, that might sound strange. You wonder how that
25 could work, but in fact, it's really a pretty simple operation.

1 People would get software that was freely available on the
2 Internet and then directly copy from each other using a system
3 known as BitTorrent. And in BitTorrent, there was no company
4 running the system.

5 Further, the users who were engaging in the copying on
6 the system were completely invisible to the outside world. So
7 piracy flourished and the music industry continued to implode.
8 The only hope to address this piracy came from monitoring
9 companies that developed new technologies to infiltrate the
10 illegal component of BitTorrent. Appearing to act as any other
11 user and identifying the users who were making an unlimited
12 number of unauthorized copies available to the world, these
13 companies made it possible to document specific infringements
14 that were occurring on BitTorrent.

15 But there was still a problem. The actual infringers,
16 the actual identities of the infringers remained hidden because
17 on BitTorrent, users are only identified by their IP address.
18 And what's an IP address? Probably most of you know that, but
19 it stands for Internet Protocol address and you will hear that
20 it's an identifying number given to Internet users.

21 Critically, users obtain their IP addresses from their
22 Internet service provider, the company like Grande, that
23 provides Internet service to its users. And an Internet
24 service provider like Grande is the only party that can match
25 an IP address to the specific subscriber to whom it had

1 assigned that address. The monitoring companies can't do that
2 matching, the record companies can't do that matching. In
3 fact, only the ISP providing the Internet service has the
4 records necessary to match the IP addresses to specific
5 subscribers.

6 So when the monitoring companies found and documented
7 infringements on BitTorrent, they notified the only entity that
8 had power to do anything about it, the ISPs. The monitoring
9 companies sent millions of notices of infringement to ISPs,
10 including Grande, telling them which IP addresses were
11 infringing, which songs they were infringing, and when they
12 were doing it. Why? Because as I said before, the ISP is the
13 only party with the ability to find out who those IP addresses
14 belong to.

15 That's simple, indisputable fact explains why we're
16 here and why this case is so important. Since only the ISPs
17 can connect the infringing IP addresses to the infringing
18 users, they're the only party that can pass on the notices of
19 infringement to the users and take action if the infringement
20 doesn't stop. And without their participation, there's
21 literally no way to address this rampant infringement.

22 And as I said earlier, for seven years, from 2010 to
23 2017, Grande took no action whatsoever to terminate any
24 subscriber who committed infringements using Grande's broadband
25 service and, instead, continued to provide that service to

1 those users to enable them to continue to infringe.

2 And what was happening in those seven years? Grande
3 was receiving millions of infringement notices. Indeed, they
4 received 1.3 million notices just from the monitoring company
5 that documented the infringements at issue here, a company
6 called Rightscorp. And even though the notices demonstrated
7 thousands and thousands of infringers, some of them who
8 infringed more than hundreds and hundreds of times, Grande did
9 nothing to address this and instead continued to provide them
10 with service.

11 So now Grande has to face a case it could have easily
12 avoided. A case in which plaintiffs will demonstrate the
13 infringement of over 1400 of their works that occurred only
14 because Grande provided broadband service to its infringers. A
15 case where Grande received specific notices of the infringement
16 and did nothing, and a case in which Rightscorp not only sent
17 notices documenting the infringement, but also downloaded
18 unauthorized copies, usually multiple copies, of every one of
19 the works in suit from Grande subscribers.

20 And all of those downloads will be presented to you.
21 And these 1400 tracks include recognizable and commercially
22 successful recordings by the top stars in multiple genres from
23 country to rock to pop to rap.

24 Now, your first and foremost task here is determine
25 whether Grande is liable for the infringement committed by its

1 users. As Judge Ezra will instruct you -- and he will instruct
2 you on the law -- the law has a doctrine called contributory
3 copyright infringement, which is the claim asserted here.
4 You'll hear more about that claim in detail when you get
5 instructions from the court.

6 But what we will prove in this case is that there was
7 direct infringement by Grande's users, and you'll see a
8 mountain of evidence on that point, that Grande provided
9 material contribution to those infringements in this case by
10 providing the very tools and mechanisms necessary for it to
11 happen, and that Grande knew about the infringements through
12 the mountain of notices it received.

13 While it's not relevant to whether Grande has
14 committed contributory infringement or to the plaintiff's
15 burden to prove our case that Grande is liable under this law,
16 the law has gone further and has specifically addressed the
17 issue of whether it's fair to apply this doctrine of
18 contributory infringement to ISPs.

19 A law called the DCMA, or Digital Millennium Copyright
20 Act was enacted more than 25 years ago to balance the needs of
21 content community, the creators of music, books, film and other
22 content, and the responsibility of the ISP communities. And
23 that balancing resulted in a very good deal for the ISPs in two
24 specific ways.

25 First, it freed them from any obligation to monitor

1 infringement on their networks. So there's no duty on any ISP
2 to snoop or police on its users. Second, the ISPs got a safe
3 harbor defense, a get-out-of-jail-free card that protects them
4 from claims of contributory infringement for their users'
5 infringement. But they get that safe harbor if, and only if,
6 they take a few simple steps, the most important of which, for
7 this case, is that an ISP must set up a reasonable policy for
8 addressing repeat infringement on its network and, when
9 appropriate, must terminate users who repeatedly infringe
10 copyrights.

11 Grande obviously knew and understood this, as they had
12 such a policy up until 2010. And they did again after 2017.
13 But they didn't in the time period that is before you. Given
14 that, it's hardly surprising that Grande is not eligible for
15 this safe harbor. It does not get the get-out-of-jail-free
16 card, because between those seven years, Grande, by its own
17 admission, never implemented a policy for addressing and
18 terminating repeat infringers. So given all of these
19 undisputed facts, it's eminently fair that Grande be forced to
20 face the music and defend against the claim of contributory
21 copyright infringement.

22 And as I said before, that claim rises or falls
23 depending on whether plaintiffs can prove the standards that
24 you'll hear from Judge Ezra, and the issue of whether Grande
25 qualified for the safe harbor is not a factor in deciding

1 whether plaintiffs have proven their case.

2 However, here there is evidence, and it's clear and
3 powerful. Grande's users committed over a million detected
4 acts of infringement. And Grande was specifically put on
5 notice of each of them. And yet Grande continued to provide
6 each one of them with high-speed broadband Internet service.

7 So let's put this story back into the context of the
8 music industry, for this is a case where you as the jury will
9 have to engage in a little bit of time travel or memory game,
10 because the critical events in this case didn't happen in 2022
11 in Austin during Austin City Limits, it happened between 2010
12 and 2017 when Grande admittedly failed to address infringements
13 on its network.

14 And as I will describe later, the music industry at
15 that time was not the music industry of today. It was an
16 industry in free-fall, hoping to find some way to stop the
17 hemorrhaging of jobs and money. And in the midst of this
18 calamity, there was a company, Grande, that had had a robust
19 policy to address piracy on its network, but suddenly removed
20 that policy in order to reap economic benefits at the expense
21 of the music industry.

22 In essence, its owners opened the door to unlimited
23 infringement on its high-speed Internet broadband service
24 because they would get away with it. And if the recording
25 industry, all the artists and the entire economy based on that

1 industry suffered, well, that wasn't their concern, even if the
2 company was based in the live music capital of the world, a
3 city that is an integral part of that industry. And the damage
4 caused by that selfish decision is precisely the issue for you
5 in this trial.

6 So what will you hear at this trial? You will hear
7 testimony from representatives of all three of the label groups
8 and the RIAA about the way the industry operates, its
9 partnership with artists, its investments, its risk taking and
10 accomplishments, how it generates revenue, and how it needs to
11 spend lots of money to generate that revenue, its desperate
12 attempts to recover from the tsunami of piracy that was
13 unleashed in the late 1990s and destroyed the business model of
14 the industry, the damage that piracy caused and the critical
15 role that ISPs play in any attempt to address infringement
16 using BitTorrent.

17 You'll hear testimony from Greg Boswell from
18 Rightscorp, one of the multiple monitoring companies that
19 documented the massive infringements going on in Grande, about
20 how monitoring companies are able to detect infringements, even
21 in the anonymous closed-door world of BitTorrent. How they
22 pose as regular users of BitTorrent and make agreements with
23 other users called "handshakes" to download illegal copies of
24 copyrighted works.

25 He will explain that Rightscorp is reliable and their

1 notices are reliable, because it's built around the same tool
2 that's used by the BitTorrent system itself to run efficiently
3 and with reliability. Digital fingerprints called hashes that
4 ensure that the songs and movies that users want are precisely
5 the ones that are copied, because only perfectly identical
6 recordings get the same hash. Indeed, even microscopic changes
7 to a recording result in a different hash. Rightscorp used
8 these same hashes to ensure that they were identifying the
9 infringements accurately and provided them.

10 And finally, Mr. Boswell will explain how Rightscorp
11 was able to eliminate all doubt about the accuracy of its work
12 by downloading at least one complete copy, and often many more,
13 from every one of the 1422 works in issue here from Grande's
14 users, and all those downloads will be in evidence in this
15 case.

16 You'll hear testimony from plaintiff's expert, Barbara
17 Frederiksen-Cross, who has over 39 years of experience as a
18 software developer and forensic software analyst, confirming
19 the reliability of the Rightscorp evidence, explaining how hash
20 matching ensures reliability, and attesting to the reliability
21 of the download evidence.

22 Then you will hear testimony from Grande's own
23 employees about how Grande had implemented a robust policy of
24 addressing infringements on its network and how that policy
25 worked. Specifically, prior to 2010 when Grande received

1 notice that one of its users was engaged in copyright
2 infringement, Grande took appropriate escalating punitive
3 steps. It sent e-mail and paper notices to its customers, and
4 it suspended the account of users until they called Grande to
5 talk through the issues. And when appropriate, they terminated
6 users who continued to infringe.

7 You will even see and hear evidence from the Grande
8 employee who set up that system that he thought it worked well
9 and would have opposed any change to it. However, as I
10 mentioned before, in 2009 Grande was bought by a Boston-based
11 private equity group that installed ABB to manage Grande. And
12 in 2010, ABB abolished that policy. And so the company
13 operated without any policy for addressing infringements on its
14 network for seven long years, the seven years before you in
15 this case.

16 Indeed, the only policy that Grande had during these
17 years was not to terminate any user for copyright infringement
18 no matter how many notices of infringement they received about
19 that users, and some subscribers were the subject of a
20 staggering number of notices.

21 This did not go unnoticed at Grande. Indeed, you'll
22 see an e-mail from a Grande employee questioning whether a
23 system that allows users to accumulate such a large number of
24 infringement notices without any consequences was a broken
25 system, and another e-mail from another Grande employee asking

1 whether Grande might lose its safe harbor defense under the
2 DCMA as a result.

3 And you will also hear how Grande slowly grew to
4 realize that it had made a huge mistake. And its actions
5 during this period are hard to reconcile with the stories they
6 will tell you at this trial.

7 First, you will hear about how from 2014 on, Grande
8 was monitoring a case very similar to this one. It was filed
9 by a music publishing company named BMG against an ISP called
10 Cox Communications, how BMG's case, like this case, was based
11 on notices from Rightscorp. You will hear about how Grande
12 reacted in early 2016 after BMG won that case.

13 And two things stand out powerfully about Grande's
14 response. The first is that instead of immediately recognizing
15 its error in implementing a proper policy for addressing
16 infringement by its users, Grande simply continued to ignore
17 the infringements on its network despite receiving notices
18 providing details about specific infringements, and continued
19 to provide broadband Internet to every infringer identified in
20 those notices. Indeed, it didn't even make a cosmetic attempt
21 to address that infringement until after it was sued in this
22 case more than a year later.

23 And the second is that despite the critical role that
24 Rightscorp played in the Cox trial, Grande's conduct
25 immediately after the verdict showed that it had none of the

1 concerns about reliability of Rightscorp's evidence, that
2 defendants and their counsel will vehemently present to you
3 after I'm done.

4 As you will hear and see, shortly after the Grande
5 verdict -- after the Cox verdict, excuse me, Grande realized
6 that due to what it described as a technical glitch, it had
7 never sent the Rightscorp notices it had received on to the
8 infringing subscribers. In response, it quickly devised a
9 technical fix so that future Rightscorp notices could be
10 forwarded. But then right there at that moment, Grande's
11 management decided to -- to use their term -- "suspend" fixing
12 the glitch. So one might think that if Grande had any concerns
13 whatsoever about the reliability of the Rightscorp evidence,
14 the system, that concern would have surfaced then. But nothing
15 of the kind happened.

16 After a short period, Grande started sending out the
17 Rightscorp notices to its infringing users. Hardly the conduct
18 of a company that today professes to be so outraged by the
19 alleged unreliability of the Rightscorp system. But a year
20 later, plaintiffs filed this action, and now the real
21 scrambling began. Grande realized that it needed to both make
22 some token effort to address infringements by its users and to
23 come up with excuses for why the Rightscorp notices shouldn't
24 be sent. And so they hired lawyers to come up with those
25 excuses for why it was okay that they did nothing in response

1 to the 1.3 million notices that they received from Rightscorp.

2 Why do I say that? Because there are a number --
3 numerous fingerprints proving that Grande never doubted the
4 validity of Rightscorp notices until they were sued and had to
5 come up with excuses.

6 First, Grande admitted in this case that they never
7 did any technical evaluation of the Rightscorp system. Second,
8 they rejected Rightscorp's overture for a meeting to discuss
9 Rightscorp's system and findings. Third, there are e-mails
10 from Grande's employees showing that they believed that
11 infringement notices reflected actual infringements. One said,
12 *Believe me, they know they did it.*

13 And fourth, even after the verdict in Cox based on
14 Rightscorp notices, they decided to forward the Rightscorp
15 notices to their subscribers, not alleging any of the alleged
16 infirmities that it now claims.

17 But, nonetheless, after they were sued, Grande
18 responded by terminating a handful of users and fabricated a
19 series of notices about why Rightscorp couldn't be trusted.
20 And you'll hear them all in this case, and they'll all be
21 presented forcefully as if they always represented Grande's
22 position. But there are two fatal flaws in Grande's
23 narratives.

24 The first is, as a technical matter, they're all
25 frivolous, given the hash-matching and downloads of every work

1 in suit. The second is that they're clearly all after-the-fact
2 excuses. Even after the verdict in Cox, no one at Grande
3 raised any doubt about the validity of Rightscorp notices.
4 Grande knew that these reflected actual infringements. And of
5 course they did. They knew, as everyone knew, that these users
6 were infringing, and that the only reason that users made
7 libraries of music and film content available on BitTorrent was
8 to enable other users to make unauthorized copies of that
9 content.

10 Indeed, the entire premise of Grande's position in
11 this case that the notices don't reflect actual infringement
12 ignores the obvious and dispositive fact that BitTorrent users
13 who make massive files of music or movies available to the
14 world were constant and viral infringers. No one doubts that
15 fact. Yet Grande's entire case is premised on the empty
16 assumption that people who made vast libraries of content
17 available voluntarily on BitTorrent weren't infringing.

18 And after you hear about how the industry operates,
19 the impact of digital piracy on the industry, and the story of
20 how Grande took advantage of digital piracy to make profits at
21 the expense of the industry, the remainder of plaintiff's case
22 will consist of expert testimony providing further context for
23 your deliberations.

24 Specifically, you'll hear from Andy Bardwell, a
25 statistician, who analyzed the notices that Rightscorp sent to

1 Grande, and will describe how many repeat infringers Grande
2 had. You'll also hear from William Lehr, an economist, who
3 will testify about the harm that plaintiffs suffered and the
4 benefit that Grande received from the infringements; in
5 particular, how the damage is impossible to quantify because
6 BitTorrent infringements are viral, and every copy can be used
7 to create thousands of further infringements so that the
8 specific infringements identified by Rightscorp are only the
9 tip of the iceberg.

10 And you'll hear from Terry McGarty, a former
11 telecommunications industry executive, about how Grande had the
12 technical capabilities to address the infringement notices it
13 received and to comply with its obligations, but it didn't.

14 So what will you hear from Grande in this case? A
15 series of excuses and finger-pointing in an attempt to deflect
16 attention from their plain and obvious liability. First and
17 foremost, they blame Rightscorp. Indeed, when you hear
18 Grande's case, you may well think that Rightscorp is the
19 defendant in this case, but when you hear their excuses, ask
20 yourself whether there's any evidence showing that Grande
21 doubted the accuracy of Rightscorp notices prior to the filing
22 of this suit.

23 Moreover, see if Grande has any response or rebuttal
24 to the hash-matching that provided the forensic security for
25 the Rightscorp system and identified over 1.3 million

1 infringements and downloaded infringing copies of each work
2 just to make sure. Instead, they will argue that Rightscorp
3 should have kept more data relating to the infringements. They
4 will try to characterize it as destruction of information,
5 because that sounds so inflammatory, but what they're really
6 saying is that Rightscorp was obligated to incur the
7 significant cost of maintaining data that was redundant and
8 unnecessary, given the hash-matching that underlies BitTorrent
9 and the Rightscorp system.

10 They will also raise a myriad of other technical
11 objections, none of which Grande had ever articulated before it
12 was sued and none of which is any rebuttal to the forensic
13 certainty of hash-matching and the belt-and-suspender support
14 provided by the infringing downloads. And they'll try to
15 create a smokescreen by complaining about Rightscorp's business
16 practices, specifically the fact that in its notices,
17 Rightscorp offered the infringer the opportunity to settle the
18 claim for a small payment.

19 However, the only relevance of Rightscorp to this case
20 is its notices, not its business practices and, therefore, the
21 only issue you should need to consider is whether those
22 monitoring services are reliable, not whether you personally
23 like the business plan. Moreover, as you will see, other
24 companies engaged in the same practice and Grande viewed such
25 practices as common in the industry and felt that they didn't

1 affect the reliability of notices. Rather, they felt that the
2 notices themselves reflected actual infringement.

3 And they may make a series of equitable arguments
4 about how it's unfair to come after them despite their critical
5 role in facilitating the infringements and the refusal to take
6 any measures to mitigate the damage. They'll say that they
7 couldn't investigate the allegations in the notices. But ask
8 yourself, who asked them to do so? Who asked them to be a
9 judge deciding the validity, particularly since they never
10 challenged the validity any time during the seven years that
11 we're talking about?

12 They will ask you, what do we do if we're confronted
13 by an infringement notice and a denial of infringement by the
14 user? Well, that one is easy. Ask them to show you the
15 evidence for any users who claim that they were innocent. It
16 didn't happen. And this, just like all the other arguments is
17 simply a smokescreen to hide their wrongful inactivity in the
18 face of massive infringement that happened only because they
19 continued to provide broadband service to infringing customers.

20 And as the evidence mounts and the proof of massive
21 infringement becomes overwhelming, some other questions may
22 emerge, such as, why is Grande taking the side of the
23 infringers instead of the artists who created the works that
24 are being stolen? Who is asking the ISP to monitor its network
25 or snoop on its users? Who is asking the ISP to vet or test

1 the reliability of the monitoring company? Certainly, Grande
2 never did so. And mostly, why is the ISP taking the side of
3 the infringer?

4 Indeed, why is Grande manufacturing a position for the
5 infringer that the infringer never asserted?

6 The only reason that Grande attacks Rightscorp and
7 acts like an avenger for infringers is that it concededly
8 failed to take the simple steps that would have allowed it to
9 avoid suits like this altogether, but it did more than that.
10 It simply turned a blind eye to the massive infringement on its
11 network because it felt that was someone else's problem.

12 But that's the very reason why the doctrine of
13 contributory infringement exists, to impose a duty on those who
14 provide the mechanisms for infringement, and then look the
15 other way when it occurs.

16 Grande blames others as well. It blames Audible
17 Magic, the industry standard technology that matched the
18 downloads that Rightscorp had obtained from Grande's users to
19 the works in suit. It blames the record companies for their
20 enforcement strategy. It even blames its users, but it never
21 looks in the mirror and accepts responsibility for the fact
22 that it knew what its responsibilities were and simply
23 abdicated them.

24 The simple fact is that Grande knew what it was
25 supposed to do, and did it for years, and then abolished the

1 policy, and allowed infringements to flourish for its own gain.

2 In fact, in its current policies that it makes
3 available on the website, Grande expressly announces to
4 subscribers and to the public that it is -- and these are their
5 words on their website, *"obligated under federal law to adopt,*
6 *reasonably implement, and inform Internet subscribers of a*
7 *policy for the termination in appropriate circumstances of*
8 *Internet access subscribers who repeatedly violate the*
9 *copyright laws."* From the defendant's mouth. So Grande knew
10 about its obligations both before 2010 and after 2017. Somehow
11 there was some collective amnesia in the time in between, and
12 that's why we're here right now.

13 And perhaps most cynically, Grande may argue that
14 terminating users is too harsh because of peoples' reliance on
15 the Internet. In essence, portraying itself as guardians of
16 the weak and helpless. But if that happens, don't fall for
17 that trap. Grande has no problem terminating users that don't
18 pay their bills. You'll see evidence that they did that
19 thousands of times when their own finances were at stake. It
20 simply doesn't want to lose a single penny to address damage
21 being done to someone else, in this case, the music industry in
22 a city where they operate is a vital part of that industry.

23 Three other quick points before I wrap this up.
24 First, as Judge Ezra will advise you, this is a civil case, and
25 so the plaintiffs merely need to prove their case by a

1 preponderance of the evidence. You heard that from the
2 Magistrate Judge before you were sworn in as well.

3 So if you've heard in school or TV or on the Internet
4 that this need to prove a case beyond a reasonable doubt, that
5 doesn't apply here. That only applies in criminal cases.

6 What does a preponderance mean? Again, Judge Ezra
7 will give you the actual formulation, but it basically just
8 means that we need to prove that our case is more likely than
9 not. We're confident that you'll have a much deeper level of
10 belief than that, but that's all that's necessary.

11 Second, damages in this case will be calculated under
12 the terms of the copyright act that provides what are known as
13 statutory damages. The reason for statutory damages is that
14 often in copyright cases, it's impossible to quantify damages
15 precisely. And so it considers a variety of factors in setting
16 a range for possible damages. And again, Judge Ezra will
17 recite the list of factors for you. And I won't address them
18 with you other than to say that in assessing statutory damages,
19 you look at -- and we will contend that you look in this case
20 at the circumstances of the infringement and the fact that
21 we're dealing with the operation of the BitTorrent ecosystem
22 where infringements don't occur without ISPs, where
23 infringements can't be identified without ISPs, where no action
24 can be taken against infringers without ISPs, and where the
25 infringements are inherently viral, and a single infringement

1 can become a separate distribution node and go on to create
2 thousands of additional infringements.

3 And we also will suggest to you that an award is
4 necessary to deter the defendant in this case because of its
5 willful conduct. And you'll hear more about that during jury
6 instructions in this case as well. But simply put, it just
7 continued to ignore repeated infringements on its network and,
8 in fact, the time period after it found out about the result in
9 the Cox case is a perfect example of why this particular
10 defendant needs to be deterred from future infringement,
11 because acting on their own, they simply don't care.

12 Third, as I mentioned before, you'll have to engage in
13 some time travel. The financial situation of the recording
14 industry is stronger today than it was back in 2010 when Grande
15 opened up the flood gates to infringement. That's a good
16 thing, but it doesn't give Grande a pass for the damage it did
17 during those years.

18 When our story starts back in 2010, the industry was
19 still in economic free-fall. It was based upon an economic
20 model where people were possessing copies of recordings. But
21 the availability of MP3 files in the late '90s destroyed that
22 model entirely and income continued to drop year after year
23 after year. But there was a little ray of hope at this point.
24 New streaming services were just starting to appear, taking
25 advantage of the fact that the public were starting to carry

1 around smart phones, little portable computers in their pockets
2 that enabled them to take music everywhere. And so now it was
3 possible to contemplate a musical business model based on
4 access to music instead of possession to music, and that was a
5 pivotal change in the music industry.

6 But it's that change, that transformation, struggle to
7 get a foothold for years. The first early companies failed.
8 And even Spotify, when it opened up in the United States in
9 2011 struggled mightily and hemorrhaged money for the first few
10 years. In fact, the prevalence of free, unauthorized music led
11 many people to believe that they didn't have to pay for music
12 at all and that all the investment was just an ongoing gift,
13 and frustrated and slowed down the transition to the model
14 where people can now access all the world's music through a
15 subscription.

16 So Spotify tried to address their losses, tried to get
17 a toehold, by operating a free service that was supported by
18 advertising dollars. And at least in this way the industry was
19 continuing -- or starting to receive some compensation through
20 that advertising money. And it was hoped that the free tiers
21 -- the free ad-supported tier, would convince many of those
22 users to -- that unlimited access to all the world's music was
23 worth subscribing to.

24 But during the seven years that are at issue in this
25 case, during the seven years when Grande had the collective

1 amnesia of what its obligations were after it repudiated its
2 policy and before it reinstituted it later, that was the time
3 period that it was very uncertain that this strategy would
4 work.

5 As I said before, Spotify was losing tons of money,
6 and Grande was making the job much more difficult by turning a
7 blind eye to the massive piracy on its network.

8 So yes, things did turn around. Apple Music entered
9 the streaming market in 2015. Things started to turn around,
10 so that by the time we're sitting here in 2022, the situation
11 is better, but it's still not better on an inflation-adjusted
12 basis than it was in 1999, 23 years ago.

13 But the important point is that during the time that
14 Grande was facilitating infringements, it imposed enormous
15 losses on the industry, losses for which it should have to
16 answer, and for which it has no defense.

17 So after you've seen all the evidence, I think certain
18 facts will be clear. Grande once had a robust policy to
19 address infringement on its network, but abolished it to make
20 more money. Multiple monitoring companies found mountains of
21 evidence of infringement on Grande's system, but Grande took no
22 action against a single user ever during that time and never
23 terminated a user for copyright infringement.

24 Rightscorp documented more than 1 million
25 infringements by Grande subscribers and sent more than a

1 million notices during this period, and Grande didn't even
2 forward them to the users. The infringements noticed by
3 Rightscorp were based on forensically reliable hash-matching
4 that made error impossible. Rightscorp backed all this up with
5 downloads, further proving the infringements at issue. And
6 tellingly, Grande never raised a word of protest. Never said
7 any of the things that you're about to hear until after it got
8 sued. These are all after-the-fact excuses, when they
9 understood they needed some rationale for ignoring the very
10 evidence that sustained the Cox verdict.

11 And that Grande defense in this case is, in fact,
12 nothing more than fictional narratives created after the fact.

13 Before I close, let me thank you again on behalf of
14 all plaintiffs for your service. We understand the sacrifice
15 of jury service. But this is a critical case for the music
16 industry and the artists it represents. It's a privilege to be
17 here in Austin during Austin City Limits and to see the power
18 of music firsthand and to appreciate what a resource and
19 treasure it is for all of us and how it needs to be protected.

20 We appreciate your attention. Thank you.

21 THE COURT: All right. We'll take about a five-minute
22 recess, let counsel get ready, and let the jury use the
23 restroom if you need to. And then we'll come back, and it will
24 be counsel's opportunity to make his opening statement.

25 COURT SECURITY OFFICER: All rise.

1 (10:40 a.m., jury exits the courtroom.)

2 * * *

3 (10:53 a.m.)

4 COURT SECURITY OFFICER: All rise.

5 THE COURT: Please be seated.

6 * * *

7 COURT SECURITY OFFICER: All rise for the jury.

8 THE COURT: All right. Please be seated.

9 All right, ladies and gentlemen. You're now going to
10 be hearing the opening statement by the counsel for Grande, and
11 he's going to be reintroducing himself.

12 MR. BROPHY: Thank you, Your Honor. Good late
13 morning, ladies and gentlemen. I'm Richard Brophy. We're
14 going to be proving two things in this case. Number one, we're
15 going to prove the Rightscorp system is not legitimate and that
16 it sent false accusations of infringement.

17 Number two, we're going to prove Grande has no idea
18 what its customers are doing online, and so therefore, it
19 cannot knowingly facilitate music sharing. I'm going to talk
20 about both those topics during my opening, but before then, I
21 want to make -- set the stage just a little bit.

22 This case is not about protecting musicians. You're
23 not going to hear testimony from a single musical recording
24 artist during this entire trial. This case also is not about
25 music sharing harming the record label's business. You're

1 going to learn that the record labels will let anyone listen to
2 as much music as they want on Spotify for \$9.99 a month. In
3 fact, you're going to learn that it would cost less than
4 \$200,000 to purchase a Spotify account for every single Grande
5 customer accused of sharing music in this case, and that would
6 let them listen to all the music that's going to be in this
7 lawsuit and plus much, much more, and they're going to be able
8 to listen to it continuously, 24 hours a day, seven days a week
9 for years. Every accused customer for years for less than
10 \$200,000.

11 You're going to learn in this case the record labels
12 are going to be asking you for as much as \$200 million, one
13 thousand times as much money as it would cost to purchase every
14 single accused customer a Spotify account, a thousand times as
15 much.

16 You're going to learn this lawsuit is nothing more
17 than a money grab. The record labels are going to come in here
18 and try to romanticize their industry, and they're going to try
19 to tug at your heartstrings by mentioning famous musicians.
20 This case is not about any of that.

21 The entire case that the record labels have here is a
22 lottery ticket that they purchased from the Rightscorp company,
23 and they're here in court hoping it's going to pay out. We're
24 going to show you that lottery ticket is a loser. Every single
25 allegation of infringement in this case is based on e-mails

1 sent by Rightscorp.

2 We're going to show you that for a decade or more the
3 record labels have known that Rightscorp is not a legitimate
4 business. We're going to show you e-mails like this one, and
5 you can hopefully see it on the screen there also, in which
6 individuals from the record labels indicated they weren't going
7 to form a relationship with Rightscorp because they had
8 concerns about their methods, and they were put off by
9 Rightscorp's solicitation tactics.

10 You're also going to learn that the record labels
11 tried to affirmatively stop Rightscorp from doing what they
12 were doing and then wanted to distance themselves from the
13 company so no one thought they were in any way affiliated with
14 Rightscorp or the e-mails that they were sending.

15 As a result of that, you're going to learn the record
16 labels never hired Rightscorp to monitor a single song or to
17 send a single e-mail on their behalf, not one. Despite all
18 that, you're going to learn that shortly before filing this
19 lawsuit, the record labels bought a bunch of Rightscorp e-mails
20 in bulk. And they bought those e-mails in bulk for the sole
21 purpose of filing this lawsuit to try to fleece Grande for
22 money.

23 You see, during this trial, the record labels, they're
24 going to hope to trick you into thinking that the Rightscorp
25 accusations are legitimate, even though they've known for years

1 and years that they aren't, which is why they never worked with
2 them in the first place.

3 You're going to learn during this trial that
4 Rightscorp's business is failing. It was a business model that
5 was built on volume and scare tactics. Rightscorp's plan was
6 to manufacture as many e-mails as it possibly could and spew
7 them out there, hoping that people would be scared into paying
8 them money. The more e-mails that Rightscorp sent, the more
9 money it stood to make. You're going to learn Rightscorp
10 thought it could get away with this because it never expected
11 its e-mail accusations to see the inside of a courtroom.

12 You're going to see documents like this one. This is
13 going to show you that Rightscorp purposefully designed its
14 business model to avoid having its accusations scrutinized in
15 court. Rightscorp didn't want anyone peeking behind the
16 curtain. Rightscorp purposefully asked for small amounts of
17 money, 20 or \$30, to resolve the accusations that it sent. And
18 the reason it asked for those small amounts is because no one
19 is going to file a lawsuit and go into court and dig into
20 Rightscorp's operations over \$20 or a hundred dollars or \$500.

21 But when Rightscorp's business model failed, they sold
22 their e-mails to the record labels for some quick cash, and now
23 the record labels are here, have filed this lawsuit, to try to
24 make some quick cash of their own. But as a result,
25 Rightscorp's e-mails are now in court, and we are scrutinizing

1 them and we're going to show you they don't hold any water.

2 We're going to show you during this trial, affirmatively, that
3 whole swaths of Rightscorp's accusations were false.

4 During this trial, Rightscorp is going to claim that
5 it reaches out and connects to computers and downloads
6 evidence. Rightscorp is going to claim it scrutinizes that
7 evidence to look to see whether individual computers have music
8 and are sharing it. Rightscorp is going to claim it sent
9 e-mails to Grande only when the evidence indicated that
10 computers were actually sharing music, because Rightscorp
11 wanted Grande to send those e-mails off to Grande subscribers,
12 who would then get scared and send Rightscorp money.

13 But you're going to learn Rightscorp wasn't really
14 inspecting the evidence the way they should have been. You're
15 going to learn Rightscorp sent e-mail accusations of music
16 sharing even when they knew the individual computer was not
17 willing to share a single piece of music. And even when they
18 knew the individual computer didn't even have the song in the
19 first place.

20 But even worse, you're going to learn Rightscorp
21 deleted all the evidence. Every single packet of data that
22 Rightscorp claims it collected from an individual Grande
23 customer's computer is gone. That is the evidence on which all
24 of Rightscorp's e-mail accusations are based. But you see, if
25 the evidence doesn't exist, no one can look at the e-mails and

1 determine which ones are true and which ones are false and that
2 means Rightscorp can send as many e-mails as it wants and it
3 can try to collect more money.

4 Because Rightscorp deleted all the evidence, it is
5 impossible to identify each and every e-mail they sent that is
6 false. But more importantly, it is equally impossible to prove
7 that a single e-mail that Rightscorp sent is true. And this is
8 a big problem for the record label's case, because their entire
9 case is based on the e-mail accusations that Rightscorp sent.
10 There is not any evidence from a Grande customer to support a
11 single e-mail accusation that Rightscorp sent.

12 What I have on the screen is an e-mail accusation that
13 Rightscorp has sent. And you can't read the small text, but
14 I've blown up part of it. You will have the opportunity to
15 look at these documents during your deliberation in detail.
16 And frankly, you'll probably see more detail about some of
17 these throughout the trial. But I've blown up the part that
18 shows the details of the accusation.

19 During this trial, the record labels will not be able
20 to show you any evidence from a Grande customer's computer
21 proving that the song Angel, by Aerosmith was shared with
22 anybody else. They're not going to show you packets of
23 information from a Grande customer's computer. They're not
24 going to show you packets from any other computer using that IP
25 address there, and they're not going to be able to show that

1 that song was shared on the date and time on this e-mail or any
2 other date or any other time.

3 All the record labels have in this case is a stack of
4 e-mails that Rightscorp sent. And then they're going to trot
5 somebody in from Rightscorp, a guy named Greg Boswell, he's the
6 programmer. And the record labels are paying him to come here
7 and say, Trust me, we had evidence. We don't have it anymore,
8 but trust me, we had evidence.

9 Accusations will not be enough to prove the record
10 label's case and they can't show you any actual evidence
11 because it doesn't exist. Rightscorp either never had it in
12 the first place or they purposefully deleted it.

13 At this trial, the record labels are going to try to
14 convince you that Rightscorp's system is perfect, that it's
15 flawless, that every single e-mail Rightscorp sent proves an
16 individual Grande customer actually shared music. They don't
17 have any evidence to show that to you, not a single shred from
18 a single Grande customer. And we're going to show you hundreds
19 and hundreds of instances in which the accusations are
20 affirmatively wrong.

21 But it's important to bear in mind this lawsuit does
22 not accuse a single Grande employee of actually sharing music.
23 The only accusation is that Grande's customers shared music.
24 And so the problems with Rightscorp's system and the false
25 accusations it was sending, they're only half the story.

1 In this case, the record labels will tell you that
2 because Grande received these e-mail accusations, that Grande's
3 employees knew, actually knew, didn't suspect, didn't believe,
4 but actually knew that its customers were sharing music with
5 others.

6 Ladies and gentlemen, that's dead wrong. We're going
7 to explore throughout this morning, what's left of it, and
8 throughout the trial, that knowing about an accusation is not
9 the same thing as knowing that an accusation is true. And this
10 leads to the first key question of the day. I'm going to be
11 posing a couple key questions during my opening. You're
12 welcome to write these down. You don't have to. I think you
13 have notepads, but these questions we think are very important
14 to consider throughout the trial and during your deliberations.

15 And the first question I'm going to ask is: Can
16 Grande investigate or verify Rightscorp's accusations? You're
17 going to learn during this trial Grande has no way to
18 investigate the accusations and no way to verify that a single
19 e-mail accusation it received from Rightscorp is true or false.

20 Now, most of you probably already know this, but
21 companies like Grande only connect people to the Internet.
22 Grande is a delivery service and its job is to move packets of
23 information between its customers' computers and other
24 computers that are on the Internet. To be clear, Grande is not
25 the Internet. I realize that seems basic, but some people

1 don't understand that fully, so Grande is just providing a
2 connection to the Internet. And Grande's people will testify
3 under oath at this trial that they do not know and do not track
4 what their customers are searching for online, what
5 advertisements they've received from the Internet or what
6 websites they're visiting.

7 And the record labels will not be able to show you a
8 single document indicating that Grande's employees monitor what
9 their customers do on the Internet. None of those documents
10 exist. They're not going to be able to show them to you
11 because Grande doesn't do it. Grande acts like the Post
12 Office. The Post Office moves letters back and forth between
13 houses. It does not open your mail or read it. Grande moves
14 packets back and forth between computers. It doesn't open
15 them, and it doesn't read them.

16 During this trial, Grande's employees are going to
17 acknowledge that music sharing happens on the Internet. We all
18 know it does. But Grande can't see what its individual
19 customers are doing online. And for that reason, they don't
20 know whether individual customers are sharing music or not.
21 And that's the fundamental issue you're going to learn about in
22 this case. Grande doesn't spy on its customers or know what
23 messages its customers are sending to other people and so it
24 cannot know whether an individual accusation against an
25 individual customer is true or false.

1 During this trial, Grande's employees are also going
2 to agree they received a bunch of e-mails from Rightscorp. But
3 you're going to learn those e-mails don't prove Grande knew
4 individual customers were sharing music, only that they knew
5 someone said they were. The e-mails are not evidence. And
6 they're certainly not proof, and there was no way for Grande to
7 validate or investigate them.

8 And bear in mind, you're going to learn all these
9 e-mails came from Rightscorp, who was in the business of
10 manufacturing and sending as many accusations as it possibly
11 could to try to make money. It's going to be vital throughout
12 this case for you to draw a strong line between knowing about
13 an accusation and knowing that an accusation is true.

14 The record labels are going to try to confuse you on
15 that point. Please don't let them trick you. Knowing about an
16 accusation is not the same thing as knowing that it's true.

17 At this moment, each of you knows I'm wearing a tie.
18 You also know you're sitting in a courtroom. Those aren't
19 accusations, not beliefs. You know it's true because you're
20 sitting here and you're observing my tie and the courtroom.

21 Well, what if I told you the juror sitting next to you
22 ran a red light this morning? What if I sent you an e-mail or
23 a hundred e-mails accusing your fellow juror of running a red
24 light? And what if in those e-mails I put details? They ran
25 it right at 8th and Congress, and they did it at 8:25 a.m.

1 That doesn't mean you know they ran the red light. That means
2 you know I accused them of running the red light.

3 But I could also show you pictures of the individual
4 running the red light in their car at 8:25 a.m. If I could
5 prove that the pictures were legitimate and hadn't been
6 doctored, they would then be the evidence that supports the
7 accusation that someone ran the red light.

8 We're going to show you that here Rightscorp sent a
9 bunch of accusations, a whole bunch, bunches and bunches, but
10 not a single shred of evidence. We're going to show you during
11 this trial that they didn't send that evidence because they
12 don't have any of that evidence. None of it exists.
13 Rightscorp's notices are designed to look very official to
14 scare people into paying money. But these accusations are so
15 disconnected from reality, they can't be used to determine when
16 or even whether any song was ever shared.

17 Got a little red pointer here, this fancy set of
18 numbers and letters at the top. That did not come from a
19 Grande subscriber. That was manufactured by Rightscorp. It
20 was randomly generated by its system. The same goes for the
21 file name. That didn't come from a Grande customer either.
22 You're going to learn Rightscorp had that information days,
23 weeks, months or even years before they sent this e-mail.

24 The same goes for the IP address. That didn't come
25 from a Grande customer either. In fact, you're going to see

1 Rightscorp's own documents and they're going to indicate that
2 back when this music sharing was taking place, most of it
3 occurred because someone else was connecting to your Internet.

4 So who exactly is accused here? Is it Grande's
5 customer? Is it their partner or their children or the
6 neighbor across the street? How is Grande supposed to know
7 what the accusation is and how is Grande supposed to
8 investigate those accusations to know whether they're true or
9 not?

10 Going back to the e-mail, this date and time here,
11 you're going to learn that's not the date and time a single
12 song was sent. Rightscorp is going to admit that. It's the
13 date and time the Rightscorp programmer hit "go" on his
14 program, not when the music song was shared. These e-mails do
15 not contain any smoking gun, anything equivalent to the picture
16 of the person running the red light that would be evidence to
17 support an accusation. These e-mails are only accusations.
18 There is no evidence included.

19 You're going to hear testimony from the CEO of
20 Rightscorp during this trial. And he is going to admit in his
21 testimony he does not know how Grande or anyone else could
22 validate the e-mail accusations his own company sends.

23 I want you to take a moment to let that sink in. The
24 CEO of Rightscorp will admit he doesn't know of a way for
25 Grande to validate the e-mails that his company sent.

1 Rightscorp's e-mails don't include evidence, and even if they
2 did, Grande would need some way to validate that evidence to
3 verify whether the accusation is true or false.

4 You're going to learn Grande had no way of doing that.
5 And that's because the Internet provides a private
6 communication channel. And you're going to learn Grande
7 doesn't spy on its customers. And you're going to learn Grande
8 also isn't the FBI. Grande's employees are going to testify
9 they can't kick down peoples' doors, take their computers and
10 scan them for illegal activity.

11 By the same token, you're going to learn that Grande
12 doesn't have the power to investigate Rightscorp, to look at
13 its documents or dig into how its system operates. We're also
14 going to show you that even if Grande could do those things and
15 acts like law enforcement and collect all this evidence, Grande
16 also isn't a court. It doesn't have the ability to weigh facts
17 and evidence from Rightscorp on the one hand and from the
18 customer on the other to determine who is telling the truth and
19 who isn't.

20 As I'm going to discuss in a little bit here, you're
21 going to learn that whenever Grande received an accusation of
22 music sharing from one of its customers, it would send a paper
23 letter to that customer to let them know about the accusation.

24 And you're going to learn that customers would call in
25 confused by the accusations against them. You're going to hear

1 from one of our witnesses who talked to one of those people
2 directly and he's going to say they swear they did nothing
3 wrong. How is Grande supposed to know who is telling the
4 truth? Is it Rightscorp with their e-mail accusations? Is it
5 the subscriber who calls in swearing they didn't do anything
6 wrong?

7 Remember throughout this trial, Grande is in the
8 business of providing Internet service. It's not in the
9 business of collecting evidence or deciding innocence and
10 guilt. And you're going to learn law enforcement has never
11 been involved in this dispute. And no court has ever
12 determined that a single Grande customer, for which these
13 notices were sent, was guilty of sharing music. Think about
14 that.

15 You're going to learn all we have is these e-mail
16 accusations from Rightscorp. And who the heck is Rightscorp
17 anyway? They're not working with any law enforcement body.
18 It's a guy in a room named Greg Boswell hitting "go" on a
19 program, sending e-mails, trying to scare people into paying
20 money.

21 During this trial, you're going to learn Grande is
22 just stuck in the middle. Greg Boswell in his room is making
23 an accusation. The customer calls Grande and says, I have no
24 idea what this accusation is all about. And Grande is stuck in
25 the middle with absolutely no way of knowing whether the

1 accusation is true or false. Knowing about an accusation is
2 not the same thing as knowing that it's true.

3 Now, typically, with this kind of dispute, you would
4 have someone make an accusation, and then they present evidence
5 to support that accusation. And then the individual accused
6 would have the opportunity to defend themselves, to present
7 evidence of their own, and all of that information would go to
8 the Court. And the Court would weigh that evidence and
9 determine whether the individual is innocent or guilty. And if
10 the Court determines that individual is guilty, then the Court
11 decides on the punishment, the Court decides.

12 During the trial, the record labels are going to argue
13 you should just ignore this process. Let's skip right from the
14 accusation and let's go directly to the punishment. The record
15 labels will argue Grande should have blindly accepted
16 Rightscorp's e-mail accusations as true, should have assumed
17 every single citizen that they accused of doing something wrong
18 actually did it and that Grande should have automatically
19 punished all those people with permanent Internet disconnection
20 for their entire household.

21 It's easy for the record labels to point fingers and
22 say that Grande should have shut of a bunch of peoples'
23 Internet. They aren't the ones stuck in the situation of
24 trying to decide who is right and who is wrong, who is telling
25 the truth and who isn't. They also aren't the ones being

1 targeted by Rightscorp and they aren't the ones who have the
2 threat of losing their Internet connectivity.

3 We're going to show you during this trial the record
4 label's case is an attempt to throw innocent until proven
5 guilty right out the window. They don't think people should
6 have the benefit of the doubt. They don't think people should
7 have the opportunity to defend themselves, to face their
8 accusers or to present evidence of their innocence. And
9 because Grande didn't blindly dole out these punishments, the
10 record labels will argue Grande itself should be punished.

11 Throughout this trial, think about whether the record
12 label's position is rational.

13 Another key question. Did Grande really act like an
14 accomplice? In Mr. Bart's opening, you heard some pretty
15 charged allegations against Grande and its people. Throughout
16 this trial, the record labels are going to argue that we've
17 compromised our values. And that we knowingly participated in
18 helping people engage in music sharing. But as the Court will
19 instruct you -- and I think already has -- what we say up here
20 is not evidence. The actual evidence comes during the trial in
21 the form of documents and testimony from the actual witnesses.
22 And you're going to hear from Grande's witnesses and you're
23 going to understand that the allegations that have been levied
24 against Grande and its people are nothing but hot air.

25 During this trial, you're going to hear from Grande's

1 employees directly, people that worked and lived in this
2 community, like Lamar Horton who is the head of operations.
3 You're going to learn that he and the other folks at Grande are
4 just people trying to make a living, trying to do a job to
5 provide quality service and Internet connection for people here
6 in Texas.

7 Now, during this trial, the record labels are going to
8 show you e-mails between various Grande employees and they're
9 going to try to twist those e-mails into admissions that
10 Grande's people actually knew Rightscorp's accusations were
11 true. But that will be the record labels grasping at straws.
12 You're going to learn it is literally impossible to know
13 whether Grande's accusations are true. Literally impossible.

14 Throughout this trial, please listen to Grande's
15 witnesses' testimony, not the arguments by the record labels'
16 attorneys.

17 By the end of this trial, you're going to know
18 Grande's people are not villains or accomplices. We're going
19 to show you they're just caught in the middle of a dispute
20 between two third parties with no way of knowing whether the
21 accusation is true or false.

22 During this trial, you're also going to learn that for
23 years Grande did what it thought was the right thing to do
24 under the circumstances. Grande has a team of people whose job
25 it is to process these accusations of infringement that it

1 receives. They process the e-mails and they also field phone
2 calls from individuals who call in who are accused of sharing
3 music. You're going to learn Grande isn't ignoring these
4 accusations. It just doesn't know whether they're true or
5 false.

6 And so when Grande receives an accusation, it sends a
7 paper letter to the individual customer telling them that
8 someone accused them of sharing music. The letter tried to
9 educate the customer on what the accusation was all about, what
10 steps they could take to try to secure their wireless networks,
11 and how to look for file-sharing software on family computers.
12 These letters provided recommendations for who to contact at
13 Grande for help in investigating the accusations.

14 Now, this is a lengthy letter, and you can't see most
15 of it. You'll have the opportunity to review it in full, but
16 these letters and the other evidence that you're going to see
17 during this trial will prove Grande's employees were not
18 accomplices. They were not knowingly or intentionally
19 assisting music sharers. They were doing the exact opposite.
20 They were trying to help people stop music sharing if it was
21 taking place.

22 During this trial, you're also going to learn that
23 Grande has started terminating customers based on accusations
24 of music sharing from companies other than Rightscorp. You're
25 going to learn this is not something Grande wants to do. But

1 you're going to learn Grande is being forced to take those
2 measures, forced to terminate people based on mere accusations,
3 because the record labels are filing lawsuits like this one.
4 And you're going to be in the privileged position of deciding
5 whether termination programs like the one Grande was forced to
6 implement are necessary.

7 Another key question, the big one: Are Rightscorp's
8 e-mails truthful? During the period of time that Grande was
9 receiving these accusations, these e-mails from Rightscorp, it
10 didn't have the ability to dig into Rightscorp's system.
11 You're going to learn that during this trial. But during this
12 lawsuit, Grande's attorneys, me and my colleagues, and our
13 hired experts, we were given access to Rightscorp's secret
14 source code and its internal documents. We're going to show
15 you some of those materials and they're going to prove Grande
16 was right not to blindly assume that all of Rightscorp's
17 accusations were legitimate.

18 During this trial, we're going to show you that even
19 if Rightscorp's system operated exactly as Rightscorp claims --
20 and I say "claims," because you're going to learn no one
21 actually knows how the Rightscorp system worked. But if it
22 worked as Rightscorp claims, we're going to show you its
23 accusations were false. To understand the flaws of the system,
24 you have to learn just a little bit about how the Rightscorp
25 system operates.

1 You're going to learn during this trial that
2 Rightscorp and the record labels will claim Rightscorp reached
3 out to something called a tracker and pulled down a list of
4 computers allegedly engaged in sharing of music. And
5 Rightscorp and the record labels are going to claim that
6 Rightscorp went through that list one by one connecting to the
7 computers on the Internet to have a conversation with them.
8 Rightscorp is going to claim it did this to determine whether
9 those computers had songs and were sharing them.

10 Now, there's lots of data that goes back and forth
11 during these conversations. I'm not going to bore you with it
12 all, but there are two pieces of information that I'm going to
13 highlight that you're going learn about during this trial that
14 we think are important.

15 The first piece of information is a bit field. A bit
16 field is a piece of data that indicates whether a computer on
17 the Internet actually has a song or not. The bit field
18 indicates whether the computer has the song. The second piece
19 of data is the choke. The choke data indicates whether the
20 computer is willing to share the song. Bit field is whether
21 you have it, choke is whether you'll share it. And Rightscorp
22 will claim it connects to computers and pulled this evidence
23 down.

24 Rightscorp is going to claim it analyzed that
25 evidence, and only when the evidence indicated someone had the

1 music and was sharing it, they're going to claim they sent an
2 e-mail. We've got a blowup of that e-mail. This is a
3 different part of it. This is the part that highlights the
4 various accusations that were made. Rightscorp makes three
5 accusations in this e-mail. We caught you downloading,
6 uploading or offering to upload a song.

7 We're going to talk about each of those. First with
8 the download. Maybe all of you know this, but a download is
9 when you have a file somewhere on the Internet and you pluck it
10 through the Internet down to your own computer. That's a
11 download. Now, Rightscorp sent e-mails accusing people of
12 downloading songs. But you're going to learn Rightscorp's
13 people are going to admit during this trial their system can't
14 detect people downloading songs.

15 The CEO of Rightscorp will admit during this trial, we
16 don't monitor for downloads. Now, he's going to say, We don't
17 choose to monitor for downloads. But you're going to learn
18 Rightscorp can't detect downloads. Can't monitor for them.
19 It's impossible. Rightscorp sends e-mails accusing people of
20 downloading songs. Their own people are going to admit they
21 can't detect that.

22 What about uploading? As you probably already know,
23 uploading is the opposite of downloads. It's where a file goes
24 from your computer somewhere else through the Internet. That's
25 an upload. Rightscorp sent e-mails accusing people of

1 uploading songs. You're going to learn Rightscorp's system
2 can't detect people uploading songs.

3 You're going to hear from Greg Boswell, the programmer
4 for Rightscorp, and he's going to admit Rightscorp doesn't have
5 any information about the sharing of payloads, songs, with
6 other people. Rightscorp sends out e-mails indicating it
7 caught someone uploading a song. When you dig into Rightscorp,
8 they don't detect people uploading songs.

9 What about the third one? The third of the three, an
10 offer for upload. An offer for upload is like an upload that
11 never happens. Your computer has the song, you say you're
12 willing to share it, but it doesn't ever go anywhere, no copy
13 is made. Rightscorp accused people of offering to share songs.
14 We're going to show you Rightscorp accused people of sharing
15 songs even when it was told they weren't willing to share
16 songs. You see, sometimes the Rightscorp computer would reach
17 out and say, Hey, I want to talk about a song. And to be cute,
18 we're going to use the song Happy Birthday here. And the
19 computer says, Okay, what do you want to know? Rightscorp
20 says, Will you share the song with me? And the computer says,
21 No.

22 Now, these are computers talking, not humans, so they
23 don't say, Do you have a song, and No. But instead, that
24 computer is going to send back choke data indicating whether
25 that computer is willing to share the song file or not.

1 Now, what happens in the Rightscorp system when it
2 receives evidence in the form of choke data indicating that
3 that computer isn't willing to share the song? Rightscorp
4 accuses that person of sharing the song, generates an e-mail
5 and sends it off to Grande. It just got evidence in the form
6 of choke data indicating that computer isn't willing to share
7 the song and it sent the e-mail anyway.

8 Greg Boswell, programmer for Rightscorp, again, you're
9 going to hear from him and he's going say, Rightscorp ignores
10 the choke data. Rightscorp doesn't care whether the computer
11 is willing to share the song or not. It is going to send
12 e-mails, so off they go. Three accusations in the e-mail.

13 We're going to show you that all three of those are
14 not legitimate. Those are the only three.

15 Well, we're going to show you that Rightscorp even
16 sent e-mails when it knew the individual didn't even have the
17 song in the first place. Sometimes the Rightscorp computer
18 would reach out and say, I want to talk about that song Happy
19 Birthday. And the computer would say, What do you want to
20 know? Rightscorp would ask, Do you have the song? The
21 computer says, No, don't got it, can't give it to you.

22 Essentially, what's going on here, once again, because
23 they're not talking English, is the bit field data from that
24 customer computer was sent back to Rightscorp and indicated
25 that computer doesn't have the song. The bit field said no

1 song here.

2 What does Rightscorp do when it gets that information?
3 Well, it accuses that person of having the song and sharing it.
4 Fires an e-mail right off to Grande.

5 We're going to show you Rightscorp designed its system
6 this way to make more money. We're going to show you
7 Rightscorp wasn't in the business of accurately detecting and
8 documenting instances of music sharing. Rightscorp was in the
9 business of sending scam e-mails to make money.

10 You're also going to learn during this trial the
11 record labels knew about it. You're going to see e-mails like
12 this one where the record labels indicate Rightscorp is milking
13 people for money. They're going to try to block the activity
14 and distance themselves from Rightscorp because they don't want
15 anything to do with what's going on at Rightscorp.

16 Another key question. What do the record labels
17 consider to be legitimate evidence of music sharing? You're
18 going to learn during this trial that for years the record
19 labels have used another company to conduct their detection.
20 To be crystal clear, this case is not about any e-mails sent
21 from that company, not one. This case is only about e-mails
22 sent from Rightscorp. But during this litigation, we obtained
23 documents that indicate and reflect what the record labels
24 require their own monitoring company to collect and save to
25 document instances of music sharing before they accuse someone

1 of sharing music. These contracts will prove to you that the
2 record labels require evidence to be collected and saved, not
3 ignored and not deleted.

4 We're going to show you documents like this one
5 indicating that the record labels require evidence packages.
6 And those evidence packages, you're going to learn, include all
7 the packets of data transmitted back and forth between the
8 monitoring company and the computer in question, including the
9 bit field and choke data that I discussed with you earlier.
10 These evidence packages are the equivalent of the pictures of
11 the person going through the red light. They're the evidence
12 that supports the accusation in the e-mail.

13 We're going to show you the record labels care so
14 dearly about these evidence packages, the collecting and saving
15 evidence, that they go to the trouble of listing out all the
16 individual evidence they require to be collected and saved to
17 substantiate an accusation of music sharing. This includes
18 things like a log of all the steps of the investigation, the
19 dates and time stamps; and number four, that all-important bit
20 field that indicates whether the computer even has the song in
21 the first place.

22 But here comes another key question. Once you learn
23 at this trial what the record labels require as far as evidence
24 to be collected and saved, the next logical question is going
25 to be What evidence can they show you to indicate that

1 Rightscorp's accusations are legitimate?

2 You're going to learn during this trial Rightscorp did
3 the exact opposite of what the record labels require. They
4 didn't collect and save evidence of music sharing. You're
5 going to learn they trashed everything, if they ever had it in
6 the first place.

7 Putting back up that list of evidence required by the
8 record labels. You're going to hear from the lead programmer
9 at Rightscorp and he's going to admit they don't retain a log
10 of all the steps of their investigation with dates and time
11 stamps. He's going to say -- admit they don't log all the
12 control communications. He's going to claim he doesn't even
13 know what those are. You're going to learn those are the
14 packets that go back and forth between the monitoring company
15 and the computer. They don't keep them.

16 You're going to learn he doesn't keep traceroute data.
17 Traceroute data is what shows all the computers that the
18 packets pass between when they go from one computer to the
19 other on the internet, to prove that the monitoring company
20 actually connected to that computer and talked to it. They
21 don't have that stuff.

22 Those bit fields. The programmer is going to claim he
23 collected those bit fields and then he's going to tell you he
24 deleted them. They don't store it. He's going to say they
25 don't take screen shots, they don't have any of the other

1 evidence that the record labels affirmatively require in their
2 evidence packages.

3 The record labels are going to tell you during this
4 trial Rightscorp collected to that tracker and pulled down that
5 list of computers participating in the network sharing songs.
6 And they're going to tell you Grande's computers -- Grande's
7 customers' computers were on that list. And then they're going
8 to tell you Rightscorp reached out to all these computers and
9 had conversations with them to determine whether they had songs
10 and were willing to share them. That means they exchanged
11 packets and they collected bit field data and choke data.

12 Can they show you any of this evidence at this trial?
13 Absolutely not. You're not going to see a single list pulled
14 down from a tracker identifying all the computers on a network
15 sharing music. And you're not going to see any Grande's
16 customers' computers on that list. Gone. You're not going to
17 see a single packet of data that passed back and forth between
18 a Grande customer's computer and the Rightscorp system. Gone.
19 No bit fields indicating that an individual computer had the
20 song in question. Gone. The choke flag indicating whether the
21 computer was willing to share the song. Gone.

22 Throughout this case, you should ask yourselves why
23 did Rightscorp get rid of all this extremely important
24 evidence? And did they ever even have it in the first place?
25 Without any evidence, there's no way of knowing whether

1 individual Rightscorp accusations are true or false. The
2 evidence that supports the accusation is gone.

3 The record labels will have the burden of proving that
4 these accusations are true. It's not going to be our burden to
5 prove they're false. It's going to be their burden to prove
6 these accusations are true, and they won't be able to do it
7 because they don't have any evidence, because Rightscorp either
8 deleted it or never had it in the first place.

9 We're going to show you that for years, the record
10 labels didn't want anything to do with Rightscorp. Suddenly,
11 now, when there's money on the line, they're all buddy-buddy
12 with Rightscorp and they want you to think that Rightscorp's
13 system and the accusations that it sent are beyond reproach,
14 that they're faultless, that they're perfect. The evidence is
15 going to show that isn't the case. Far from it.

16 Another key question -- and I'm going to change the
17 topic a little bit here -- is the record labels' download story
18 credible? At this trial, the record labels are going to argue
19 that Rightscorp's accusations are true because Rightscorp went
20 out to Grande customers' computers and plucked songs and
21 downloaded them. First and foremost, you're going to learn
22 none of that information made it to Grande. Rightscorp didn't
23 tell Grande it had downloaded any songs and didn't provide
24 evidence of any of those songs. If Rightscorp didn't send it,
25 Grande can't know about it.

1 But even more importantly, we're going to show you
2 Rightscorp didn't send any of that evidence because it didn't
3 have any of that evidence.

4 You're going to learn during this trial there is not
5 evidence that Rightscorp ever connected to a single Grande
6 customer's computer or downloaded a single song from it. They
7 don't have a single packet of information to show you to prove
8 that they ever connected to a Grande customer's computer.

9 They're going to claim that Rightscorp had a set of
10 download targets, right, a list of computers that Rightscorp
11 was going to go out to the Internet and try to download songs
12 from. And they're going to claim they had download
13 communications. They talked to each of those computers as part
14 of the process of pulling those songs down, and they're going
15 to admit to you that in some instances the download didn't
16 work. They couldn't get the song in question.

17 Does Rightscorp have any of this evidence? You're
18 going to learn they don't. Rightscorp is not going to show you
19 a single list of the computers that they tried to download
20 songs from. They're not going to show you a single
21 communication with a single Grande Internet customer's computer
22 where they actually downloaded a song, and they're not going to
23 show you -- they're certainly not going to show you instances
24 in which they tried and failed to download the song. You see,
25 if the evidence doesn't exist, no one can determine how often

1 Rightscorp reached out and accused someone of sharing music,
2 but then when they connected to the computer, they couldn't
3 download the song they accused the person of sharing. All you
4 will see at this trial is a list of songs, and they're going to
5 cart in the guy from Rightscorp, Greg Boswell, to say, Trust
6 me, I got this stuff from Grande's computers.

7 But there will not be any evidence of that other than
8 his say-so. No documentation, no computer data. Just, Trust
9 me, it happened.

10 The download story is also going to be bad for the
11 record labels because Rightscorp doesn't even claim to have
12 downloaded a song from all the customers they accused of
13 sharing music. You're going to learn that in total Rightscorp
14 accused roughly 9,000 Grande customers of sharing music, but
15 they're only going to even claim they could download a song
16 from 492 of them. That's their best day, 492. That leaves
17 roughly 8500 Grande customers accused of music sharing. And
18 the Rightscorp folks aren't even going to claim they could get
19 a download from them.

20 Now, you're going to hear argument that because they
21 downloaded songs from 492 of them or so, they claim, that means
22 that the 8988 accusations are true. That's not going to make
23 any sense. But even if we were to assume for a moment that
24 those downloads did take place, notwithstanding the fact that
25 they're not going to be able to show you any evidence, you're

1 going to learn there are tons of instances in which Rightscorp
2 claims it went out to get the song and got something else.

3 Here is an example of an e-mail Rightscorp sent
4 accusing someone of sharing You Know You're Right by Nirvana.
5 And you heard about hashes earlier during the plaintiff's
6 opening statement and how they're perfect. Rightscorp
7 downloaded a picture that says Nirvana. And this didn't happen
8 once or twice or ten times or a hundred times. It happened
9 1200 times, and those are just the instances that we know
10 about.

11 Put simply, the download story that you hear from the
12 record labels is going to prove even further that Rightscorp's
13 system is fundamentally flawed. You're going to know that the
14 Rightscorp system is unreliable and that its e-mail accusations
15 are inaccurate.

16 By the end of this trial, you're going to know
17 Rightscorp's system deleted evidence and generated false
18 accusations of music sharing. You're going to know that
19 because Rightscorp deleted that evidence, the record labels
20 can't prove that Rightscorp's accusations are true. You're
21 going to know Grande has no way to investigate Rightscorp's
22 accusations or what its subscribers are doing, and you're going
23 to know that Grande did not knowingly or intentionally
24 facilitate music sharing.

25 At the end of this trial, we're going to ask you for a

1 verdict in favor of Grande Communications. And I genuinely
2 thank you for your patience throughout this trial. Thank you.

3 THE COURT: All right. Thank you very much. Well,
4 it's about a quarter to 12, not really enough time for us to
5 get plaintiff's first witness up here, get them sworn, and get
6 started. As soon as we did that, we'd have to recess. So we
7 will see you back in the jury lounge at about 1:20 or so.

8 Please remember not to discuss this matter among
9 yourselves or among anyone else you come in contact with just
10 as Judge Howell earlier instructed you. Thank you. You can be
11 excused.

12 COURT SECURITY OFFICER: All rise for the jury.

13 *(11:44 a.m., jury exits the courtroom.)*

14 * * *

15 THE COURT: Okay. The jury is departed. Counsel, is
16 there anything else that you would like to address with me?

17 MR. GILMORE: Yes, Your Honor, one evidentiary issue.
18 Robert Gilmore for the plaintiffs.

19 THE COURT: Yes.

20 MR. GILMORE: So, we have three exhibits that are
21 compilations of copyright registration documentation, and we're
22 going to start introducing them I think with the next witness
23 from Sony, Mr. Walker. And they are part of our evidence to
24 prove the statutory elements for our works in suit to be
25 eligible for statutory damages. They don't go to ownership,

1 since Your Honor already ruled they're ownership, but they're
2 simply to show the date of registration and publication.

3 And Grande has stipulated to the copyright
4 registration certificates themselves, but the compilations for
5 some works also include printouts from the Government Copyright
6 Office. And we understand Grande isn't going -- is either
7 objecting or not willing to stipulate to them. But numerous
8 courts have held that courts can take judicial notice under
9 Rule 201 of a printout from a government office and,
10 particularly, these kinds of printouts from the copyright
11 website that reflect this information that is judiciously
12 noticeable. I have several case cites, but we think those
13 should be admissible.

14 THE COURT: All right. Just a minute.

15 Is there any suggestion that they're not legitimate?

16 MR. HOWENSTINE: Well, the issue is not one of
17 legitimacy, Your Honor, but just the foundation or relevance of
18 things other than the copyright registration certificates. We
19 understand they want to introduce these certificates. That's
20 fine. We don't have an issue with that. We don't understand
21 what purpose or relevance or what foundation they could lay to
22 introduce basically searches they ran on the copyright office
23 website.

24 THE COURT: If they acknowledge that the copyright is
25 valid and you have the copyright, why do you want to put the

1 other material in?

2 MR. GILMORE: I think that the -- in some instances,
3 the information from the copyright website has the relevant
4 information for date of registration and publication, and I
5 think in some instances --

6 THE COURT: That isn't in the copyright notice itself?

7 MR. GILMORE: Well, maybe not the complete information
8 for certain of the copyright registrations. It's a relatively
9 small number, but the -- I have several case cites that --
10 where courts have held that --

11 THE COURT: The point is I certainly understand, I can
12 take judicial notice of that. I don't need a bunch of case
13 cites for that. The question is whether it's necessary. I
14 mean, I'm not seeing the need for it, to be honest with you.

15 MR. GILMORE: Well, the information is not -- it is
16 relevant for the statutory criteria under Section 412 to
17 establish eligibility for the copyright -- sorry -- eligibility
18 for statutory damages, just for the --

19 THE COURT: They don't -- that's for the copyright,
20 but they don't dispute that you hold the copyright.

21 MR. GILMORE: It doesn't get to ownership. It's
22 certain dates, so the eligibility under Section 412 is
23 triggered off of --

24 THE COURT: Well, if you have and can show that the
25 copyrights themselves don't have the dates that you need and

1 this other material does have the dates that you need, and
2 there's no question about the authenticity of it, then I have
3 no problem with that. But I'm not going to let it in wholesale
4 just because somebody wants something with an eagle on it.

5 MR. GILMORE: That's certainly not the reason why. It
6 is only the specific information that is shown on the Copyright
7 Office website on registration and publication dates that are
8 relevant for the eligibility for 412.

9 Again, I don't think that these are a matter of
10 debate, but we just want to put the evidentiary proof in. And
11 our witnesses are familiar with this information, they work
12 with this daily as part of their business, so...

13 MR. HOWENSTINE: Your Honor, this is a copyright
14 infringement case, obviously. In order for them to sue for
15 infringement, they need a registered copyright. I believe what
16 Mr. Gilmore is saying is that they do not have all the
17 certificates of registration for their copyrights.

18 THE COURT: Is that true?

19 MR. GILMORE: It may be true for -- with respect to
20 certain copyrights, or -- but I think the actual relevance is
21 not as to ownership which, again, has been established, but the
22 specific dates for eligibility for statutory damages, that the
23 dates of registration itself and publication.

24 THE COURT: You two are talking past each other,
25 unfortunately. He is saying that you don't have the copyright

1 registration certificate for these, that you want to put in
2 other material. And you're saying I don't know what.

3 MR. GILMORE: Well --

4 THE COURT: Either you do or you don't?

5 MR. GILMORE: -- I am saying that either --

6 THE COURT: This is a yes, we have it, or no, we don't
7 have it.

8 MR. GILMORE: I believe that maybe for certain number
9 of works that we don't have the actual copy of the registration
10 certificate itself --

11 THE COURT: Okay.

12 MR. GILMORE: -- for purposes of showing the
13 information for 412 analysis.

14 THE COURT: And then in lieu of that, you want to put
15 in evidence?

16 MR. GILMORE: That's right, in lieu of the evidence in
17 the certificate itself.

18 THE COURT: I know that's right. What is it?

19 MR. GILMORE: It is a printout from the Copyright
20 Office website that shows the dates that are relevant for
21 statutory damages eligibility.

22 THE COURT: Does it show that the copyright exists?

23 MR. GILMORE: Oh, yes. I'm sorry. It's a record of
24 the copyright, of the work, the copyright, the registration
25 number. It has all that information in there. And relevant

1 for the purpose we're introducing it, has the registration
2 dates itself.

3 THE COURT: All right. If there's no dispute that it
4 comes from the Copyright Office and there's no dispute that
5 they own the copyright, I do not have an issue with them
6 putting that in.

7 MR. HOWENSTINE: Your Honor, I would suggest the issue
8 is perhaps not necessarily with putting them in, but with
9 whether that is sufficient or not.

10 THE COURT: Well, that's an entirely new argument
11 you're making here now.

12 MR. HOWENSTINE: Right. If they can lay a foundation
13 for the searches that were done, you know, that's fine.
14 Presumably, we won't object to that.

15 THE COURT: I'm assuming -- I was assuming that there
16 was no dispute that they owned the copyright, but when you
17 raised the argument, well, is that sufficient, that sounds to
18 me like an attack on the validity of the copyright.

19 MR. HOWENSTINE: Well, they intend to introduce the
20 registration certificates for a separate purpose, which is to
21 show the publication dates and the registration dates of the
22 copyright. Because to prove that their works are eligible for
23 statutory damages, they have to prove that those dates line up
24 with the dates of infringement --

25 THE COURT: Of course.

1 MR. HOWENSTINE: -- so that's the reason they want to
2 put the registration certificates in.

3 THE COURT: I'm going to say it again. If the
4 information comes directly from the Copyright Office of the
5 United States and they can authenticate that they've got that
6 information, then I will take judicial notice of it, unless
7 there is some question as to whether what they've done is
8 legitimate. And if you don't have that evidence, then your
9 argument doesn't stand.

10 MR. HOWENSTINE: Yeah. We are not questioning the
11 searches. We may dispute the information that is in those
12 documents, and I think we're entitled to do that.

13 THE COURT: Yes.

14 MR. HOWENSTINE: But we won't contest those being
15 admitted into evidence, assuming they can lay the proper
16 foundation, as they say they're going to.

17 THE COURT: Well, all right. I don't know what we're
18 arguing about.

19 MR. GILMORE: Then I gather we have no dispute. That
20 was our intent.

21 THE COURT: Okay. Now we're at five to 12. All
22 right. Then I'm having a hard time figuring out what that was
23 all about, but anyway. Maybe I'm missing something here.

24 MR. BART: Your Honor, if I may, I'm missing something
25 too. Because basically we all understand that the dates of

1 publication and registration are relevant to the 412 statutory
2 analysis.

3 THE COURT: Absolutely.

4 MR. BART: We have printouts from the Copyright
5 Office, regular records of the Copyright Office providing that
6 information. I don't know what foundation is being referred
7 to. They have not articulated any basis for doubting or
8 challenging that, unless they're saying that we somehow
9 manipulated -- which I can't imagine they're saying.

10 THE COURT: That's what I just asked, and he said no.

11 MR. BART: Okay. Well, then, shouldn't they just be
12 admitted, period?

13 THE COURT: I thought so.

14 MR. BART: Okay. Thank you.

15 THE COURT: I think that's what I said.

16 COURTROOM DEPUTY CLERK: What numbers are they?

17 THE COURT: Somebody needs to tell my courtroom
18 manager what the numbers are.

19 MR. BART: Thank you.

20 THE COURT: Have a good lunch.

21 COURT SECURITY OFFICER: All rise.

22 *(11:55 a.m., lunch recess.)*

23 * * *

24 *(1:26 p.m.)*

25 COURT SECURITY OFFICER: All rise for the jury.

1 *(Whereupon the jury enters the courtroom.)*

2 * * *

3 COURT SECURITY OFFICER: All rise.

4 *(Whereupon the judge enters the courtroom.)*

5 THE COURT: Please be seated. All right, ladies and
6 gentlemen. You heard all of the opening statements, and now we
7 will get right into evidence. Do they have pads?

8 COURTROOM DEPUTY CLERK: They should, yes.

9 THE COURT: Do you have pads? Okay. You can start
10 taking notes if you wish. Now, I want to remind you that
11 there's no requirement that you take notes. You can take notes
12 as much or as little as you'd like. Just remember, however, if
13 you do take any notes, those notes are not to be shared with
14 anyone, including your fellow jurors and are solely for your
15 use in helping you to recollect the evidence. Okay?

16 All right. Counsel.

17 MR. BART: Thank you, Your Honor. Plaintiffs call
18 Jeff Walker to the stand.

19 THE COURT: Okay. Just as a matter of -- I don't
20 think I mentioned this, counsel. Generally, on Friday we will
21 try to end right around 3:30, if we can. Getting out of
22 Manhattan on Friday afternoon is a nightmare. Getting out of
23 Austin, as my jurors will tell you, on Friday afternoon, is
24 worse. It's worse. Believe me. It's bad, the traffic around
25 here, or at least as bad.

1 MR. BART: Fair enough.

2 THE COURT: So they'll never get home if we don't get
3 them out of here.

4 COURTROOM DEPUTY CLERK: Please remain standing and
5 raise your right hand.

6 You do solemnly swear that the testimony you're about
7 to give in this case now before the Court will be the truth,
8 the whole truth and nothing but the truth, so help you God?

9 THE WITNESS: I do.

10 * * *

11 *(JEFF WALKER, Plaintiff Witness, Sworn.)*

12 * * *

13 COURTROOM DEPUTY CLERK: You can have a seat.

14 THE COURT: You may proceed at your pleasure, counsel.

15 MR. BART: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. BART:

18 Q. Good morning, Mr. Walker. Can you identify yourself to the
19 jury, please.

20 A. Hi. My name is Jeff Walker.

21 Q. Move the mike in front of you. Want to try now?

22 A. Yes. I'm Jeff Walker.

23 Q. By whom are you employed?

24 A. Sony Music Entertainment.

25 Q. And what is Sony Music Entertainment?

1 A. Is's a U.S. record company.

2 Q. And what's your current title there?

3 A. I'm executive vice president and head of legal affairs for
4 the global digital business.

5 Q. Okay. And what does Sony Music Entertainment do?

6 A. We develop talent and help artists create music that we
7 make available to the world and we market and promote it and
8 distribute it on their behalf.

9 Q. Is Sony Music Entertainment a plaintiff in this case?

10 A. Yes, it is.

11 Q. And is it affiliated with any other plaintiffs in this
12 case?

13 A. Yes.

14 Q. And which ones?

15 A. I believe it's Arista Music, Arista Records, LLC, LaFace
16 Records, LLC, and Samba Recording, LLC.

17 Q. And what is the relationship between Sony Music
18 Entertainment and those entities?

19 A. We're technically sister companies. We all report into
20 Sony Music Group.

21 Q. And what do those companies do?

22 A. They primarily -- the four companies I mentioned primarily
23 hold catalog, but we also have label divisions like Arista and
24 Sony Music Entertainment.

25 Q. But it all operates within the same group?

1 A. We all operate -- yes, we all operate as one company.

2 Q. And what is that operating company?

3 A. Sorry, Sony Music Group.

4 Q. Did you assist in preparing a demonstrative exhibit that
5 identifies the Sony companies that are plaintiffs in this suit?

6 A. I did.

7 MR. BART: Your Honor, permission to show this
8 demonstrative to the jury, please?

9 THE COURT: You may.

10 BY MR. BART:

11 Q. And what does this demonstrative show, Mr. Walker?

12 A. It's showing the logos of the companies that are
13 participating in the lawsuit.

14 Q. The Sony companies?

15 A. The Sony companies, I'm sorry.

16 Q. That's all right. And would you understand if I refer to
17 them as the Sony plaintiffs?

18 A. Yes.

19 Q. Are there other plaintiffs in this case as well?

20 A. Yes. Universal Music Group and Warner Music Group.

21 Q. Is there any descriptive term that is applied to the three
22 of those music groups, Sony, Universal and Warner?

23 A. Yes. We're generally known as the major record labels.

24 Q. Okay. And why are they called the major record labels?

25 A. We're the biggest record companies in the world. We have

1 roughly 80 percent of the U.S. market in terms of the market
2 share.

3 Q. Okay. And how do you know that?

4 A. We get reporting from Nielsen SoundScan.

5 Q. Do you use SoundScan in your regular business?

6 A. Yes.

7 Q. What is the primary product of these record companies?

8 A. Sound recordings.

9 Q. And what are sound recordings?

10 A. Sound recordings, they're music. They're the finished
11 product that the artist delivers to the record company that's
12 made available commercially through distribution channels.

13 Q. Let's shift for a minute and talk about your own personal
14 background. Did you attend college?

15 A. I did. I graduated from Dartmouth College in 1984.

16 Q. And what did you do after college?

17 A. I went to law school at Harvard and I graduated in 1988.

18 Q. And after law school?

19 A. I worked as a corporate associate in a private firm.

20 Q. For about how long?

21 A. For about three years.

22 Q. And what happened next?

23 A. I took a job --

24 Q. This is your life.

25 A. I took a job at Sony Music Entertainment in 1991.

1 Q. Okay. And what was that job?

2 A. Initially, I was counsel in the Law Department.

3 Q. And what were your responsibilities in the Law Department?

4 A. I drafted agreements for all the Sony Music divisions. So
5 the Classical Division, the U.S. record labels, the music
6 publishing company, video, whatever division needed --

7 Q. What type of contracts were you drafting?

8 A. Recording agreements, publishing agreements. That's
9 generally it.

10 Q. Okay. And did you move on from the law or Legal Department
11 at some point?

12 A. Yes. In 1993, I moved to the Business Affairs Department
13 for the U.S. record labels.

14 Q. So at that point you were just on the record side?

15 A. Correct.

16 Q. And what were your responsibilities when you moved over to
17 Business Affairs?

18 A. We negotiated the terms of the agreements with the artists
19 and their representatives.

20 Q. Okay. Now, earlier when you were talking about your
21 responsibilities in the Law Department, you mentioned music
22 publishing. Can you tell me what that is?

23 A. Sure. So music publishing administers rights in musical
24 compositions, which are the song.

25 Q. And what do you differentiate the composition from?

1 A. From the sound recording. The example I typically give to
2 junior lawyers is that it's Whitney Houston, I Will Always Love
3 You, because most people know it's a seminal song, and they
4 know that Whitney made it famous, but Dolly Parton is the
5 songwriter. She recorded a country version, which is also
6 great, but Dolly Parton controls the rights in the song, the
7 musical composition, and Whitney Houston's recording is owned
8 by Sony Music. We're her record company.

9 Q. So when you're talking about a composition, you're talking
10 music and lyrics, the underlying --

11 A. Yes.

12 Q. Are they covered by the same copyright?

13 A. No. They're two distinct copyrights under copyright law.

14 Q. And does the record company typically own the copyright in
15 both of those products, the sound recording and the
16 composition?

17 A. No. Typically, recorded music companies own sound
18 recordings and music company -- sorry, music publishing
19 companies administer, or own, musical compositions.

20 Q. Okay. Can you give me an example of a music publishing
21 company?

22 A. Sure. I mean, Sony Music has a music publishing affiliate,
23 which is Sony Music Publishing. Each of the major label groups
24 has a publishing affiliate, but there are literally thousands
25 and thousands of publishing companies. There are lots of

1 artists who write their own material, who have -- who control
2 their publishing, for example. They're all independent
3 publishers.

4 Q. Okay. So what was your next job after you left the Sony
5 recorded music division? I think that's where we were last.

6 A. Sure. So I -- in 1995, I left Sony to go to RCA Records as
7 head of business and legal affairs at RCA.

8 Q. So I take it that at that point in the mid-nineties RCA was
9 not part of Sony?

10 A. That's right. At the time, RCA was owned by BMG Music,
11 which was at the time one of the six major record labels.

12 Q. So in the mid-nineties, there were six major record labels?

13 A. Yes.

14 Q. And there are three now?

15 A. Right.

16 Q. What were some of RCA's artists at the time that you were
17 working there?

18 A. While I was there, we signed Christina Aguilera. I worked
19 very hard on a deal with the Foo Fighters. We also worked with
20 lots of artists who had already been signed to the label like
21 Dave Matthews Band, ZZ Top. And we also worked closely with
22 the catalog team, so Elvis Presley, John Denver, Glen Miller,
23 The State and, you know, the Pointer Sisters. It's a really
24 varied catalog.

25 Q. And what were your responsibilities at RCA?

1 A. I oversaw the Legal Affairs Department, so we were
2 negotiating, hand-drafting the agreements with the artists and
3 other creatives.

4 Q. Okay. How long did you stay at RCA?

5 A. Roughly eight years.

6 Q. And what did you do next?

7 A. In about 2002 -- 2003, I left. There was some tumult, and
8 I left to go into private practice.

9 Q. When you say "tumult," is that tumult at RCA, tumult in the
10 industry, some other tumult?

11 A. Meaning I left my job. We were -- we were basically let
12 go, and I went into private practice and represented artists
13 and songwriters and independent labels.

14 Q. And how long did you remain in your own practice, your
15 independent practice?

16 A. A little more than a year.

17 Q. Until about 2004?

18 A. Yes.

19 Q. And what happened then?

20 A. BMG called and asked if I wanted to come back in another
21 role as head of the business and legal affairs team for North
22 America, the North American Division.

23 Q. And how long were you in that role?

24 A. Two months.

25 Q. Two months?

1 A. Yes.

2 Q. What happened then?

3 A. Two months after I came back to BMG, it was announced that
4 Sony Music Entertainment and BMG Music were going to merge.

5 Q. And how did that affect you?

6 A. Well, as the companies consolidated, I was offered a role
7 back on the Sony side as head of business and legal affairs of
8 the Columbia/Epic label group.

9 Q. And can you tell me a little bit about the Columbia/Epic
10 label group at that point?

11 A. Sure. It was the -- it's basically the New York labels of
12 Sony Music Entertainment, so not including Nashville or Miami.

13 Q. Okay. And what is Columbia Records?

14 A. Columbia Records is one of the most iconic record labels
15 ever. It's also the oldest surviving record company in the
16 world.

17 Q. When did it start?

18 A. 1889.

19 Q. And can you give us a short list of their most famous
20 recording artists, Columbia's?

21 A. Yeah. I hesitate to say the most famous because there are
22 many, many, but Johnny Cash, Willie Nelson, Miles Davis, Billie
23 Holiday, Janice Joplin. I'm trying to stick with the classics.

24 Q. That's fine. And who are some of the artists who were
25 under contract at Columbia/Epic at the time you were there?

1 A. Sure. Well, The Chicks for one. I understand they're
2 performing here this weekend. But Adele, Beyonce, Bob Dylan,
3 Bruce Springsteen, Celine Dion, AC/DC. There's many, many
4 artists. Lauren Hill. A lot of artists.

5 Q. And what were your responsibilities when you were in the
6 business and Legal Affairs Department?

7 A. It was a similar role. I was the head of business and
8 legal affairs overseeing the team that drafted and negotiated
9 the agreements with the artists.

10 Q. So you were negotiating directly with artists and their
11 managers?

12 A. Yes, yes. I mean, we engage with artists periodically, but
13 it's primarily through their managers and their lawyers. And
14 managers can be just as big a personality as the artist. So
15 Sharon Osborne, for example, is Ozzie Osborne's wife and his
16 manager, and she's a hoot. And Beyonce, while I was in this
17 role, was managed by her father, Matthew Knowles, who is a
18 fantastic manager. And I flew to Texas to meet with him and to
19 try to close deals on occasion.

20 Q. What happened next in your career?

21 A. So in roughly 2010, I was offered a role as head of
22 business and legal affairs for the digital team at Sony Music
23 Entertainment.

24 Q. And are you still in that role?

25 A. I am.

1 Q. And what's your title in that role?

2 A. I'm executive vice president and head of the Business and
3 Legal Affairs Department for the global digital business at
4 Sony.

5 Q. And can you give us a little description of what your
6 responsibilities are in that role?

7 A. Sure. So I help develop the digital strategy for the
8 company and manage -- help manage the relationships with our
9 digital partners as well as overseeing the negotiation and the
10 drafting of the agreements with those partners.

11 Q. Do you have any responsibilities vis-a-vis the content
12 protection team of that company?

13 A. Yes. The content protection team at Sony Music reports in
14 to me.

15 Q. But you don't literally run it, correct?

16 A. No, no. I'm involved in setting priorities and strategy.
17 And generally, I look at content protection more from the lens
18 of development and, you know, relationship development with
19 TSPs.

20 Q. Can you give us a little bit of a description of that last
21 answer. When you say you look at content protection in terms
22 of business development, what do you mean by that?

23 A. So there are lots of platforms. I mean, part of our job
24 is -- in strategy is trying to figure out how we want the music
25 business to evolve, right? Where the business is going,

1 because in the past the business sort of got away from us. So
2 we think very, you know, intentionally about companies that we
3 may want to partner with. And content protection plays a role
4 in that, particularly as it relates to social media platforms
5 where we may have to send take-downs to make sure that our
6 content stays off the platform, that sort of thing.

7 Q. Well, when you say business development, is that business
8 development as opposed to some other facet of content
9 protection?

10 A. Well, I'm not involved in the day-to-day details of piracy;
11 for example, antipiracy, and their work on that front.

12 Q. You're looking for developing potential new digital
13 partners?

14 A. Yes.

15 Q. What do you think, from this long career in the music
16 industry, what is most important to you about the music
17 industry in the United States?

18 A. Well, I mean, the music industry, we're one of the great
19 American businesses. We -- our output is very culturally
20 significant. Pop music from America is -- you know, it's known
21 all over the world. We represent a huge -- more than
22 50 percent of the music that's consumed around the world. It's
23 a very special industry.

24 Q. Okay. And where in this country is the music industry
25 located?

1 A. Well, I mean, great music comes from everywhere. We all
2 know that. And artists come from everywhere. The business is
3 -- there are hubs around the world -- I'm sorry, around the
4 country. New York, L.A., and everywhere in between. If we say
5 Nashville, for example, you'll think country music. If you
6 think of Detroit, you'll think of Motown, and Seattle is
7 grunge. New Orleans is jazz and blues, and Austin, you think
8 of live music.

9 Q. And what are the music industry's connections here?

10 A. Well, the music industry is very involved in supporting the
11 Austin music scene. Everyone knows that Austin is the live
12 music capital of the U.S. So we're definitely embedded in
13 supporting the industry here.

14 Q. Have you ever released recordings from Austin-based
15 artists?

16 A. Sure, sure. Willie Nelson is an Austin artist. Janice
17 Joplin went to UT Austin and performed here a lot in her early
18 career. Artists like Stevie Ray Vaughan. There are lots of
19 Austin-based artists.

20 Q. And more generally from Texas?

21 A. Sure. So I mentioned The Chicks and Beyonce. They're
22 Texas artists. Maren Morris, Miranda Lambert, Roy Orbison.
23 There are a lot of Texas-based artists.

24 Q. Have you had an opportunity to become familiar with Sony
25 sound recordings that are a part of this case?

1 A. Yes.

2 Q. Do you know how many of Sony sound recordings are at issue
3 in this case?

4 A. Yes. I believe it's 453.

5 Q. Did you get a chance to look at the list of songs that were
6 involved in this case?

7 A. I did.

8 Q. Did you have any particular connection to any of them?

9 A. I did. I mean, the list of recordings, I mean, they're
10 really great recordings. One of the recordings that was on the
11 list is a recording that I recently talked to my daughter
12 about. She's -- she's been struggling a bit. She's on her
13 varsity volleyball team, and I've been talking to her about
14 using music as a tool to sort of beat out, when she's beating
15 herself up, when she makes a mistake on the court, like, just
16 use it to, like, push the bad thoughts away. And the song she
17 chose was Destiny's Child Survivor, which is one of the songs
18 that's on the list.

19 Q. Did you participate with Sony in creating a medley that
20 gives some examples of the works at issue in this case?

21 A. Yes, I did.

22 MR. BART: Your Honor, permission to play a short
23 medley of the Sony works at issue for the jury.

24 *(Music playing.)*

25 * * *

1 BY MR. BART:

2 Q. Can you tell me, Mr. Walker, why you wanted to play that
3 for the jury?

4 A. Sure. I think it's important to understand what art is at
5 issue and how important and special those recordings are. Each
6 of the artists at issue that we just played has been damaged by
7 the defendant's behavior in this case, and that damage is
8 massive. It's not small, because of the viral nature of
9 BitTorrent and peer-to-peer and, you know, what's happened in
10 this case.

11 Q. Now I'd like to shift gears a little bit and ask you some
12 questions about how a record company like Sony operates. Can
13 you tell me what the core business model is of a record
14 company.

15 A. Sure. We identify artists. We try to support them in
16 creating music. We sign them, and we market and promote their
17 recordings and distribute them.

18 Q. How does a record company obtain sound recordings?

19 A. Generally through working directly with artists who we
20 sign. On occasion, we may acquire recordings that are already
21 finished.

22 Q. Like buying a catalog or something?

23 A. Right.

24 Q. If a record company does, in fact, work with an artist to
25 create a recording through that general process that you

1 described, can you take us through that? What's the first step
2 in that process?

3 A. Well, the first step is identifying the artist, right?

4 It's -- that process is driven by our A&R team who go out and
5 find talent.

6 Q. When you say A&R, what are you referring to?

7 A. The A&R stands for artist and repertoire. That's the
8 department -- they're the creative partners of the artist.

9 Q. And what is the importance of the A&R Department to a
10 record company?

11 A. It's vitally important. Any record company that is going
12 to succeed, it succeeds based on the artist and the music that
13 it creates, so the success is entirely driven by the front end
14 of the process.

15 Q. And how does the A&R Department discover artists?

16 A. All sorts of ways. I mean, these days social media plays a
17 big role. They look at artist presence on different sites.
18 They also go scouting old-school to just live performances, and
19 they get lots and lots of demo recordings that they listen to,
20 but basically anywhere they can find talent is where they will
21 find the talent.

22 Q. And does the A&R team sign many of the artists that it
23 scouts?

24 A. No, no. I mean, of the -- typically, my observation was
25 that each A&R person would sign maybe one or two artists a

1 year.

2 Q. And does Sony have an A&R scouting presence here in Austin?

3 A. Yes. I mean, we will certainly scout here in Austin. I
4 mean, when I was at RCA Records, we would sometimes schedule
5 A&R meetings here in town. And during the day, we would do
6 roster reviews and go through every artist and their progress.
7 And then in the evenings, we would all go to shows, and A&R
8 people would be looking for new talent.

9 Q. And does A&R stay with the artist or remain involved in the
10 evolution and development of the artist's career after they're
11 signed?

12 A. Yes, so A&R is the creative partner within the company for
13 the artist, and they will -- they'll work with them
14 indefinitely. I mean, their role will change as the artist
15 evolves and develops and matures.

16 Q. Okay. Is A&R a particularly risky part of the business?
17 Does it involve a lot of uncertainty?

18 A. Yes. I mean, it's -- we believe in all the artists we
19 sign. I mean, they're all extremely talented people, but you
20 know, I don't think any record company has a hit rate that is,
21 you know, probably higher than ten percent. I mean, it's --
22 and most of the artists we sign don't succeed despite our
23 efforts to, you know, help them cross that line.

24 Q. Do you as a record company have any expectation or
25 awareness of whether something is going to be a hit before it's

1 released?

2 A. No. There is no crystal ball. And we -- you know, I can't
3 tell you how many artists I've personally gotten attached to
4 who I believed, you know, were so talented -- and they were --
5 and had fantastical albums, and for whatever reason, it just
6 didn't happen.

7 Q. And does every recording that's released by a record
8 company make a profit?

9 A. No, no, not by a long shot. It's -- so the way our model
10 works is essentially that the products that do succeed cover
11 the costs, which are fairly extensive, for all -- for
12 investment in all of the artists. It's a risky business.

13 Q. Now, once A&R has identified an artist that it wants to
14 sign, what's the next step in the process?

15 A. They will secure approval from the label management to sign
16 the act, and then they'll come to the business and legal
17 affairs team to discuss, you know, what a deal might look like
18 and turn it over to us.

19 Q. To negotiate it?

20 A. Exactly.

21 Q. And in the general case -- and, obviously, there are
22 variations, but in the general case, what does the record
23 company get as its basic consideration value that the record
24 company gets out of a recording agreement?

25 A. So we're looking for the artist to deliver recordings to

1 us. Typically, in the recording agreement, we will be granted
2 ownership of the copyrights in the recordings, which is the
3 primary transfer of rights in the contract, but that's not
4 always the case. There are increasingly deals where we secure
5 an exclusive license during a fixed term of rights in the
6 recordings.

7 Q. And why does the record company want either ownership or
8 exclusive rights as part of its contract with an artist?

9 A. Well, we don't -- we don't want to be competing with third
10 parties in the market, so we distribute to all channels our
11 full catalog.

12 Q. And, again, just speaking generally, what does the artist
13 get out of a recording agreement?

14 A. So, certainly there are payments to the artist in the
15 recording agreement. There are royalties that the artist will
16 receive in perpetuity, assuming it's a royalty deal. The
17 artist also gets commitments from the label, whether it's -- I
18 mean, certainly release commitments that will release the
19 recordings, you know, through all the distribution channels.

20 There may also be marketing commitments like, for example,
21 they may want us to commit to a certain number of videos.
22 They -- if it's a band, they may need tour support so that they
23 can be out on the road. And then they also look for
24 commitments from the label. I mean, some artists don't want to
25 be associated with certain types of products, for example, and

1 so we'll agree to restrict the way we allow their music to
2 interact in certain contexts.

3 Q. You were mentioning payments to the artist and you
4 mentioned royalties. Are there any other types of payments
5 that are made to the artist, maybe not in all contracts, but in
6 some?

7 A. Well, there are different -- do you mean, like, payment
8 structures?

9 Q. Either payment structures or payments that are not direct
10 royalty payments. Are there payments relating to the making of
11 recordings?

12 A. Oh, yeah, yeah, yeah. So, I'm sorry, there are advances
13 that are generally paid at the -- when we sign the deal, and
14 every time an artist begins to record or delivers an album,
15 there will be more payments over the course of the deal. So,
16 yeah, the deals are generally structured based on album, so if
17 they're committing to deliver up to five albums, then for each
18 album, there will be separate payments that the record company
19 is making.

20 Q. Separate recording advances?

21 A. Yes.

22 Q. Yeah, okay. And when you use the term "royalties," what do
23 you mean by that?

24 A. Royalties are monies paid to the artist. Royalties are
25 specifically a percentage. They're calculated based on the

1 agreement. And if we go back to 1889, as we just said, you can
2 imagine the number of different royalty structures at play.

3 But it's basically -- and today we try to do a fixed percentage
4 of revenue, and that goes to the artist from all exploitations.

5 Q. Are there other forms of artist deals beside the ones that
6 you mentioned?

7 A. Yes. Depending -- I mean, once an artist has, you know,
8 more stature or it's just a competitive situation, we might do
9 a joint venture, which is sort of a profit-sharing between the
10 artist and the label or we might look at what we call a P&D
11 deal or structure, which is pressing and distribution, where
12 the label takes a fee -- it's a much smaller fee -- off the top
13 for its services and the artist keeps the lion's share of the
14 revenue.

15 Q. Now, what are the deliverables from an artist under
16 recording a contract?

17 A. Sound recordings?

18 Q. Yeah. And sound recordings in what state? And I don't
19 mean Texas versus New York. I mean, in what condition they
20 need to be --

21 A. Well, yeah. I mean, so they're completed, mixed and
22 mastered, approved recordings that are -- that they deliver to
23 the record company.

24 Q. And how are these recordings created?

25 A. I mean, there are so many variations on that theme. It

1 depends on the type of artist. But generally speaking,
2 there will -- if you're recording in a studio, which a lot of
3 artists don't these days, but there will be, you know,
4 potentially instrumentation that's recorded, you know. And
5 then separately there may be vocals. There may be background
6 musicians that are recording separately. There's a lot of ways
7 that it could happen.

8 Q. And in addition to the artist themselves, what other people
9 are involved or may be involved in the recording process?

10 A. So, I mean, the A&R rep is generally coordinating, but the
11 A&R person will have introduced the artist to one or more
12 producers that they're working with, so the producers will be
13 working closely with the artist and likely be in the studio.
14 The engineers will be in the studio as well.

15 Q. And what are the jobs of an engineer?

16 A. Engineers tend to mix and master the recording. Mixing is
17 when you EQ, equalize a recording so that the sounds of the
18 instruments and the vocals are appropriately balanced and
19 everything sounds right.

20 Q. Okay. And what role does the producer play or what roles
21 can a producer play in the creation of sound recordings?

22 A. So, yeah, producers play many, many different roles
23 depending on the nature of the artist. So if an artist is a
24 vocalist, for example, a producer -- you may introduce them to
25 producers who are songwriters, and the vocalist will sing the

1 producer's song, for example. If the artist is a developing
2 artist who wants to write, but doesn't have a lot of experience
3 or confidence writing, you might pair them with a producer who
4 is really comfortable co-writing with artists. And, you know,
5 a lot of this is relationship driven, so we would introduce
6 them to a lot of potential producers to see how that gels and
7 connects.

8 And then at the other end of the spectrum, there are
9 producers who, you know, if you're dealing with a
10 self-contained band, for example, that writes all their own
11 material, the producer is really there to just help bring the
12 vision of the band, you know, or the artist, because a
13 singer/songwriter can -- you know, just to bring their vision
14 to life.

15 Q. Okay. Can there be more than one producer on a recording?

16 A. Yes, yes. And I've certainly seen situations where at the
17 end of the process another producer is brought in to review the
18 entirety of the work, and they give comments to the artist and
19 the other producers on the -- on the album.

20 Q. I won't make any "too many cooks" comments.

21 Who is responsible for paying all the people that we've
22 been discussing?

23 A. The record company does.

24 Q. Do all the songs that the artist records during the
25 recording sessions wind up getting released?

1 A. No. Rarely. Rarely. Artists tend to record many more
2 recordings than ultimately end up on the album, and I've heard
3 of artists recording over a hundred songs in order to deliver
4 an album of ten to 15 songs, so it's fairly expensive and
5 time-consuming.

6 Q. And who decides ultimately which of the songs are going to
7 be released?

8 A. That's -- I mean, it's generally collaborative. It's the
9 artist with A&R and then the management of the label, but as an
10 artist achieves more and more stature, it becomes more common
11 for the artist to take more creative control and to deliver the
12 finished product to the label.

13 Q. And what is the general role that the A&R Department plays
14 during this recording process?

15 A. I mean, I alluded to it a bit, but they are responsible for
16 supporting the artist in whatever way the artist needs to be
17 supported, so it varies depending on the kind of artist and
18 where they are in their career.

19 Q. Just to sum that up, because you said so much about the A&R
20 Department, what conclusions do you draw about the role of the
21 A&R Department within the company?

22 A. Well, they play a very important role because they're
23 identifying the talent that we're going to sign. They're then
24 overseeing the process of recording with the artist so that,
25 you know, the ultimate product that's delivered, particularly

1 for newer artists -- I mean, A&R is taking a lot of
2 responsibility for that. And our success as a company really
3 depends on how that process evolves and how successful they are
4 in bringing something really creative and wonderful to life.

5 Q. Is there anything that's created for the sale of physical
6 products other than the completed sound recordings?

7 A. So for the physical records, you would create artwork, and
8 so for physical, there's vinyl, and there's CDs. For the
9 vinyl, you would have sleeves and on the disk itself, there
10 would be a label, and that's why we're called "labels,"
11 because, you know, that's where in the old days it said
12 "Columbia" or "RCA" or whatever the label was. And on the
13 sleeve, you would have a lot of detail, which is similar to
14 what's on the CD, which will have a jewel case and liner notes,
15 which have a lot of detail about the --

16 Q. And a magnifying glass to be able to see.

17 A. Yes.

18 Q. Once the recording and the packaging is created, what's the
19 next step in getting physical product down to the public?

20 A. So once the recordings are ready and the artwork is ready,
21 when all of the components are ready, the production -- sorry,
22 the physical operations team will ship everything to the
23 manufacturing plant and order, you know, a certain quantity of
24 records to be manufactured.

25 Q. And so how does the process differ for digital products?

1 A. For digital we are -- we certainly use the artwork, but
2 there's other materials which we call metadata, which are
3 compiled, and we ship both metadata and the recordings to the
4 digital partners.

5 Q. So what information is contained within this metadata?

6 A. It's very similar to what's in the liner notes. It's the
7 artist, it's the song titles, the songwriters, the genre,
8 there's an ISRC code, which is a unique code that we use in the
9 industry for every recording so that it's easy to track
10 everything associated with that recording.

11 Q. Is that done for incoming royalty purposes?

12 A. That's certainly one of the purposes, yes. It enables
13 whoever the streaming service or iTunes, it allows them to
14 clearly identify all transactions related to our recordings and
15 to report them back to us.

16 Q. Is there anything in the metadata that includes information
17 about the digital file itself?

18 A. Well, there's a digital hash, which is like a fingerprint
19 that's also included.

20 Q. Okay. And what does the hash value look like?

21 A. It's like a long string of numbers and letters.

22 Q. Okay. Can two different digital files have the same hash
23 value?

24 A. No.

25 Q. And what happens if you take a sound recording and make

1 changes to it? Will it have the same hash value?

2 A. No, no. That would change the hash value.

3 Q. Okay. Once the product is manufactured, what happens next
4 in the life cycle of a recording?

5 A. Once the product is -- oh, so once we know -- our Sales
6 Department knows what quantities they're able to sell, they
7 would direct the manufacturing plant, they do what's called
8 packing and shipping, and they would ship it out to the
9 retailers.

10 Q. Can you give us some examples of some physical retailers
11 that still exist in 2022?

12 A. Sure. Walmart, Amazon. They -- it's digital, but they
13 fulfill physical.

14 Q. How are digital recordings distributed?

15 A. You mean how do we distribute it to the digital services?

16 Q. Yeah. Are there different -- well, first off, are there
17 different formats of digital distribution?

18 A. Oh, yeah, yes. So there's downloads, which most people are
19 familiar with, and then there are streaming services.

20 Q. When you say downloads, for those who may not be familiar
21 with it, what are you talking about?

22 A. Well, downloads from, I mean, stores like Apple iTunes or
23 Amazon are -- they're bits which -- you know, they're files
24 which have the entire recording that are transmitted to the
25 user, to their device, and it's a transfer of ownership of that

1 file to the consumer, so downloads are kind of, like, physical
2 in the sense that it's based on the ownership model where the
3 consumer owns the recordings.

4 Q. Now, you also used the term "digital download." Is that a
5 different model other than the ownership model? Not download,
6 I'm sorry, streaming. I'm a step behind myself.

7 A. Yes. I mean, streaming is based on -- generally based on
8 an access model where the consumer -- and most of the streaming
9 services have, you know, a full catalog, you know, of all the
10 recordings that they can license, that they make available to
11 their consumers either on a subscription or ad-supported basis.

12 Q. Can you give us some examples of some streaming services
13 that Sony has as digital partners?

14 A. Sure, sure. Spotify, Apple, Tidal, Pandora. There are
15 lots of them, Deezer.

16 Q. How does Sony distribute its music to these streaming
17 platforms?

18 A. We make our music available to them through a digital feed.
19 The music and the metadata goes through the feed.

20 Q. Can you tell me something about the feed? What is it
21 specifically?

22 A. It's -- I mean, basically, it's the mechanism to transfer
23 the files to the digital services. It's a very complicated
24 process. I mean, we have a lot of people who work on the feed
25 and managing the feed and keeping it going.

1 Q. Is the feed updated on a regular basis?

2 A. Yeah, daily. I mean, we -- every week there are new
3 releases that go through the feed and if an artist wants to
4 change a recording, if they don't like a word and want to
5 change a song, we pull it back from the feed and then reship
6 the new version.

7 Q. How many recordings, roughly, are in Sony's catalog or feed
8 right now?

9 A. We have over a million recordings in our catalog.

10 Q. How does a record company protect its legal interest of its
11 sound recordings?

12 A. We rely on U.S. copyright law, which protects sound
13 recordings.

14 Q. And how exactly does that work? How do you get that
15 protection?

16 A. Well, we file registrations with the U.S. Copyright Office.

17 Q. Okay. And is that reviewed by the Copyright Office?

18 A. Yeah. There are registration forms that we submit. I'm
19 not totally familiar with the process, but I know we sometimes
20 get comments, and there's back-and-forth. But generally, they
21 send us the registration forms listing Sony Music as the owner
22 or whoever the owner is.

23 Q. Are there any other legal issues that have to be addressed
24 before -- or may have to be addressed before products go out
25 the door other than just obtaining a copyright?

1 A. Yeah, so before a record can be released, we have -- we
2 review the records -- the business and legal affairs team
3 generally will review the records to make sure, you know, if
4 there are clearance issues. There could be side artists, that
5 is a guest artist from another label and we have to clear both
6 the artist and the label. There could be samples. Samples are
7 an artist may take pieces of a recording and do what's called
8 an interpolation and then use part of that recording in the new
9 recording.

10 Q. Part of a prior recording?

11 A. An existing recording, yes. And we need to clear and
12 license that. And we also license mechanical royalties -- I'm
13 sorry. We get mechanical licenses to use the musical
14 compositions in the sales of downloads and physical.

15 Q. So let me understand that last piece. Does a record
16 company have to get permission or a license from the owner of
17 the underlying composition in order to commercially release a
18 sound recording of that composition?

19 A. Yeah. That's complicated. I mean, there's such thing as a
20 compulsory license but, yes, we do secure their permission and
21 we do get a license.

22 Q. Now, earlier in your testimony you also alluded to
23 marketing. Can you tell the jury a little bit about how sound
24 recordings are marketed.

25 A. Sure. So, I mean, we talked a bit about A&R. Marketing

1 and promotion is really -- it's sort of the next core
2 competence of a record company. It's the -- it's part of the
3 real value that we bring to artists.

4 Q. Okay. And what -- how exactly does -- or not exactly. How
5 generally does the marketing process work?

6 A. Well, so once a recording is finished or close to finished,
7 the A&R team and the marketing team will get together and
8 they'll start to create the outlines of a marketing plan.

9 Q. Can you tell me some of the components that might go into a
10 marketing plan?

11 A. Sure. I mean, a lot of it relates to the marketing of a
12 single and the selection of a single, but there are many
13 divisions within the Marketing Department that support the
14 recording once it's in the market. So, you know, it's
15 everything from social media marketing, marketing to TikTok and
16 YouTube and Instagram, that kind of stuff.

17 We also have promotions, so people who work the records at
18 radio all over the country. The press and publicity teams who
19 will try to get press, but they're also trying to get
20 television shows.

21 So to give you an example, so if The Chicks is performing
22 here in Austin now, our promotion team would be trying to
23 arrange to get The Chicks into local radio stations. Our Press
24 and Publicity Department would be trying to schedule local TV
25 just to get as much exposure and buzz around them while they're

1 in town and to take advantage of that. Our sales team is
2 another team that they try to get placement, whether it's on
3 playlists on the digital side. Like, if we have a Travis Scott
4 album, they're going to try to get him on Rap Caviar on Spotify
5 or whatever the appropriate playlist is. There's so many
6 different departments within marketing and promotion. That's a
7 big part of a record company's job.

8 Q. Well, you've been talking about marketing, or at least in
9 part, marketing new releases. Is there marketing that goes on
10 for previously recorded releases once they're part of your
11 catalog?

12 A. Absolutely. I mean, our catalog is extremely valuable, and
13 we always want to try to introduce new fans to music. An
14 example that's very current is there's a current film out right
15 now, *Elvis*, by Baz Luhrmann, and Sony was very involved. We
16 released the soundtrack and provided music, obviously, for the
17 film. But we tried to build a campaign around the film to make
18 sure *Elvis*, you know, who hasn't been around in a long time, is
19 exposed to new and young audiences.

20 And that's -- even when I was at RCA back in the '90s, we
21 put out an *Elvis One's* album, and as part of a campaign, we
22 released a new single, *Little Less Conversation*, which was a
23 remix of a prior recording. And, I mean, that's the sort of
24 thing we do to try to reinvigorate the catalog from time to
25 time.

1 Q. After all of these processes that we've been talking about
2 from A&R to manufacturing and distribution and marketing and
3 all the rest, who pays for all of that?

4 A. The record company is paying for all of that.

5 Q. Are there any further parts of the record company that
6 address issues we haven't talked about such as the collection
7 of income and payment of royalties?

8 A. Yes. So we certainly have teams who validate the recording
9 that we get from different partners. It's a little more
10 complicated on the streaming side because, you know, the
11 reporting from the streaming services is very, very complicated
12 and very data voluminous. I don't know how else to say it.
13 But those teams verify that we're being paid properly, and then
14 we do also hire third-party auditors to audit -- can't talk
15 today -- to audit our streaming partners and iTunes to make
16 sure that we have been properly paid and so that artists are
17 properly paid.

18 And I should note, all our audit recoveries are shared with
19 artists, and it's been Sony's policy for a long time that any
20 revenue that -- like, from an audit -- that isn't directly
21 attributable to something but may be related to a recording, we
22 do share that revenue with artists under their contract, so
23 that includes litigation recoveries. We have been sharing for
24 years with artists.

25 Q. Now, you mentioned earlier that you work for the global

1 digital business group. Can you tell us a little bit about
2 what that business group is.

3 A. Sure. It's the team that develops the digital strategy for
4 the company and partners with digital businesses and also
5 negotiates the agreements with those businesses.

6 Q. And when was that global digital business group created?

7 A. In 2005.

8 Q. And why?

9 A. It was very clear by 2005 that -- you know, we had already
10 had several years of declines by 2005 in CD sales and we knew
11 it wasn't coming back. That was what had driven a lot of
12 the -- sorry, lost my train of thought. The declines were
13 driven by the lost CDs, driven by private piracy, and so we
14 knew we had to be more thoughtful about building a business to
15 replace the physical business that we were losing. And so we,
16 you know, sought about to, you know, focus on all opportunities
17 that might make sense to build a commercial business around
18 music at that time and going forward.

19 Q. Was streaming part of that process back in 2005?

20 A. So streaming existed, yes. The first streaming service
21 that launched, Rhapsody launched in 2001, so it did exist.

22 Q. And did Rhapsody succeed?

23 A. No, no, it did not.

24 Q. Do you know why?

25 A. I mean, I don't know that anyone can say for sure. There

1 were certainly technological issues. You know, there was no
2 high-speed Internet in 2001. Modem speed was an issue. And
3 there was -- I mean, frankly, in 2001, consumers were getting
4 content for free. It was very hard to compete with free, so we
5 don't -- I mean, it's possible that consumers just didn't want
6 to pay at that time. We don't know.

7 Q. What was Sony's first digital download partner?

8 A. It was Apple Music.

9 Q. And were there -- when was the next point where there was a
10 change in the opportunity to create a new market in streaming?
11 Were there conditions that developed that made that a
12 possibility?

13 A. Yes, so in 2007, Apple launched the first smartphone, the
14 iPhone, and that was a game changer in a lot of ways in that it
15 introduced portability. And so starting soon after that, a
16 number of services launched to try to take advantage of the
17 fact that consumers were moving to portable devices.

18 Q. Okay. And was there negative results of that as well as
19 positive results?

20 A. Well, yeah, I mean -- so as with all technological
21 advances, you know, as happened in the early days of
22 peer-to-peer, like, the same things that make the business
23 easier, it also makes piracy easier, so that was true with the
24 iPhone as well.

25 Q. When did digital piracy first develop?

1 A. Well, the digital piracy we've been talking about, it
2 really started in the late 1990s.

3 Q. And what was the cause of that?

4 A. It was -- well, it started -- I guess the cause was the
5 advent of the MP3 file.

6 Q. Can you tell us a little bit about what that is.

7 A. Sure. MP3 files are compressed files. They're much
8 smaller, which made it easier to -- and they're exact copies of
9 the recording, so it was much easier to copy and share the MP3
10 files than prior files.

11 Q. And the fact that it was smaller, how did that impact or
12 create digital piracy?

13 A. It just made it easier for sharing to go viral,
14 essentially, for -- you know, for -- whether it was
15 peer-to-peer at the time or websites or BitTorrent.

16 Q. Okay. And how did piracy during that time, during the late
17 '90s through 2004 or '05, affect the health of your company?

18 A. Well, I mean, we were losing sales. Our earnings as a
19 company were going down year, over year, over year.

20 Q. And what's the impact of that on the operations of the
21 company?

22 A. It was dramatic. I mean, it's the reason why Sony and BMG
23 merged. It's the reason why I lost, you know, my job at RCA.

24 Q. Was there a perceptible difference in the number of units
25 sold apart from just the existence of piracy?

1 A. Well, yeah. I mean -- so what we deemed to be a success at
2 the time, just changed. So in the mid-1990s there were albums
3 that would sell 10 million CDs just in the U.S., right, and we
4 had a lot of those albums. But -- and there were -- so every
5 year you would expect to see a certain number of platinum
6 albums, a certain number of double platinum and then a certain
7 number of multi-platinum. Year over year, you know, during
8 this time period from the late '90s to the mid -- until around
9 2005, 2006, I mean, it was just -- it was free-fall.

10 And so we finally got to the point where the biggest album
11 in a year would be 2 million, and that was the biggest seller
12 in the year. And so as we are trying to invest in A&R, we
13 weren't able to invest as much, because the return we were
14 getting from the products we were releasing was much, much
15 smaller. And so we had to sign fewer artists. We had to make
16 lots of adjustments and -- I mean, frankly, a lot of people
17 lost their jobs, myself included.

18 Q. Tell me a little bit about that. How did digital piracy
19 affect you in your career personally?

20 A. I mean, I've talked about that a bit, but -- so I lost my
21 job at RCA because BMG decided that it needed, for efficiency,
22 to merge several of its labels together. And Clive Davis was
23 the head of one of the labels and so he became the new head.
24 And my boss, who was the CEO of RCA at the time, lost his job.
25 And all the department heads, we lost our jobs.

1 Then, I mean, obviously, the merger of Sony and BMG was
2 driven by the same issue, the desire to create efficiencies and
3 eliminate people and sort of concentrate the artists under a
4 bigger company. I'm spacing --

5 Q. Okay. Well, you've been doing great, so take a deep
6 breath, and I'll try and place you here.

7 So you've talked about the changes through 2005 or so. Was
8 there effect of ongoing piracy that caused a further
9 directional change in your career later on in that decade?

10 A. Oh, yeah. Okay. Thank you for reminding me.

11 So by 2010, so I had been at Columbia/Epic label group
12 after the merger for, like, five or six years -- I don't
13 remember -- and they came to me and told me that I was going to
14 have to lay off one of my top lieutenants. And I had already
15 laid off people, several people in my department over the
16 years. And they said, alternatively you can also take the job
17 as the head of business affairs for the digital team.

18 And at the time, I had two small kids. I was trying to,
19 you know, figure out how I could stabilize my career in a
20 business that clearly was not stable at the time. And it
21 looked like digital was the place to be. It was the part of
22 the company that was likely to grow. It was the part of the
23 company where there was energy and excitement, and it -- I
24 mean, don't get me wrong. I loved working at the label, but it
25 had become a very depressing place to be because every six

1 months we were laying people off, and we were working so hard
2 for diminishing returns. And so I took the chance and switched
3 to digital.

4 Q. And was digital involved in trying to find alternative
5 models for monetizing your recordings?

6 A. Yes, yes. I mean, a big part of what we were trying to do
7 is to identify services that we might enable to create
8 businesses around music.

9 Q. Well, at the time that you went over there in 2010, was
10 there still a digital download market?

11 A. Yes. I mean, there was -- so this is a bit tough to
12 explain. The download market was a successful market in the
13 sense that it grew as a business, but at the same time that the
14 download market was growing, physical was declining, right, and
15 every year our topline revenue was going down. So physical --
16 I'm sorry, so downloads were growing, but not enough to sort of
17 stem the bleeding, if you will. We continued to decline.

18 Q. When did streaming -- and you may have answered this
19 already, so forgive me if I'm asking you to repeat yourself,
20 but when did streaming first become a viable way or more viable
21 way to distribute music?

22 A. Well, so starting with the phone, we certainly believed
23 that it might be the next thing to -- you know, as downloads
24 started to flatten. But I think it wasn't until 2011 that we
25 really -- there were lots of services before 2011. So, for

1 example, MOG and Artio, Ecast. Like, there were a number of
2 streaming services that launched in that time.

3 Q. Launched in the wake of the release of the smartphone?

4 A. Yes. So after 2007, but before Spotify. And those
5 services, kind of like Rhapsody, I mean, they were really good
6 services, but they didn't take off. I mean, MOG was ultimately
7 turned into Beatz or Daisy and then it was bought by Apple, so
8 it became part of Apple's infrastructure for their service.

9 Q. Oh, okay. So I think you said that Spotify launched around
10 2011, correct?

11 A. Yes.

12 Q. At least in the United States.

13 A. That's right.

14 Q. Did you have confidence that Spotify or other streaming
15 services at that time were going to turn the industry around?

16 A. Confident, I wouldn't say I had confidence. I mean, we
17 hoped that Spotify or any one of these services was going to
18 make a difference or that collectively they might add up to
19 something, but we really didn't know at the time.

20 Q. What was the basis for the concern that they might not?

21 A. Well, we were still competing with free, basically. I
22 mean, if a consumer can get something for free, we didn't know
23 that they were ever going to be willing to pay for a
24 subscription.

25 Q. Did other streaming services come into the marketplace

1 after -- major streaming services after Spotify?

2 A. Yes. I mentioned Apple. Apple launched, I believe, in
3 2015, so four years after Spotify.

4 Q. Do you know whether Spotify was making or losing money in
5 those years?

6 A. Spotify was definitely hemorrhaging money in those years.
7 And, look, Spotify was growing, but piracy served as sort of a
8 drag, if you will, on the growth of Spotify and all the
9 legitimate services because you just didn't have a market that
10 was fully available.

11 Q. Was that piracy drag present in the development in the
12 streaming marketplace between 2011 and '17?

13 A. Well, yeah. I mean, so people weren't consuming music on
14 CDs anymore. We were trying to launch new models, particularly
15 the access model or streaming and so starting in 2011 when
16 Spotify launched, I mean, you did start to see glimmers of hope
17 that they may grow, but it took time. It wasn't until 2017
18 that streaming represented half of our revenue. And again, by
19 then, after all those years of decline, half of our revenue was
20 not a lot.

21 Q. Are you familiar at all with Grande, the defendant in this
22 case?

23 A. A bit, yes.

24 Q. And what do you know about them?

25 A. I know that they're an ISP.

1 Q. Okay. And do you have any awareness of what role an ISP
2 plays in stopping copyright piracy online?

3 A. Well, I think they play a critical role because the nature
4 of the piracy is that we don't have visibility into what's
5 going on on the platforms. It's basically anonymous and
6 invisible to us, so without the help of a monitoring company,
7 there's no way for us to police what's going on on a platform.

8 And so the ISP is the only party who can connect the IP
9 address, which is the one bit of information that the
10 monitoring company gets along with the hash -- you know, the
11 ISP is the only one who can basically communicate with the user
12 and determine who the user is based on the IP address. So
13 without them, we're just blind.

14 Q. Did you learn anything during the course of bringing this
15 lawsuit about how Grande treated infringers and infringement
16 notices during this time period?

17 A. I learned that they didn't terminate any infringers at all,
18 that they didn't have a policy. Yeah, this isn't a case where
19 they made a reasonable judgment that certain users didn't hit a
20 threshold. There was no threshold. They didn't terminate
21 anyone.

22 Q. And do you think that had an affect on Sony's revenues?

23 MR. HOWENSTINE: Objection, Your Honor. The witness
24 has no personal knowledge.

25 THE COURT: Sustained.

1 BY MR. BART:

2 Q. Mr. Walker, have you personally listened to any of the
3 audio files that have been downloaded from Grande subscribers
4 during this case?

5 A. Yes. I was given a random selection of 50 files that I
6 listened to.

7 Q. And did you, in fact, listen to them?

8 A. I did.

9 Q. And did you draw any conclusions from listening to them?

10 MR. HOWENSTINE: Objection, Your Honor. Foundation.

11 THE COURT: I don't know what he's going to ask, so I
12 don't know whether -- he needs foundation.

13 What are you going to, in fact, be asking?

14 MR. BART: I'm asking whether he recognized them as
15 Sony's recordings.

16 THE COURT: The objection is overruled.

17 A. Yeah, I listened to the recordings. I listened to them on
18 Spotify as well and I compared the time stamps of the
19 recordings to confirm that they were the same.

20 Q. Can you tell me why Sony chose to participate in this
21 lawsuit?

22 A. We believe that music is very, very valuable. We invest in
23 artists. We want to support them in building their art, but
24 it's expensive, it's time-consuming. What Grande did was to
25 totally disregard the value of music. They also disregarded

1 the law. We think the infringements in this case are massive.
2 Given the viral nature of BitTorrent and peer-to-peer, we just
3 can't even say how big it is. So it's really important that we
4 signal to other ISPs and generally that, like, you know, we
5 don't want you to follow Grande's lead.

6 MR. BART: I have no further questions. I pass the
7 witness.

8 THE COURT: All right. We'll take an afternoon recess
9 now, then we'll come back, give you an opportunity to use the
10 restroom, and we'll do the cross-examination.

11 COURT SECURITY OFFICER: All rise for the jury.

12 (2:42 p.m.)

13 * * *

14 (2:56 p.m.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Please be seated. The Court would note
17 the presence of counsel, the absence of the jury.

18 I don't know why, there may be a method to this, but
19 the witness testified to something that -- this is how you know
20 I'm paying attention up here. The witness testified that the
21 defendant broke the law. Did you hear that?

22 MR. HOWENSTINE: Yes, Your Honor.

23 THE COURT: There was no objection made. I understand
24 the witness -- that's his personal feeling, his opinion, but
25 that's the province of the jury as to whether your client broke

1 the law. That's why we're here. So there was no objection
2 made. Did you want to let that slide?

3 MR. HOWENSTINE: Well, as we saw it, the cat was out
4 of the bag, Your Honor. He offered it --

5 THE COURT: Well, the cat may be out of the bag, but
6 there's something called an instruction to the jury that they
7 must disregard that statement.

8 MR. HOWENSTINE: We would ask that Your Honor give
9 that instruction when the jury returns.

10 THE COURT: All right.

11 MR. BROPHY: Your Honor, one other item -- and I
12 apologize. I polled my folks. I don't think this happened,
13 but I'm not sure the jury has been instructed that when we see
14 them in the halls, we're going to ignore --

15 THE COURT: I thought judge --

16 COURT REPORTER: He did address that.

17 THE COURT: I would certainly do that myself. I'll do
18 it again.

19 MR. BROPHY: I'm just very mindful of it.

20 THE COURT: Oh, I know. I know.

21 MR. BROPHY: Thank you.

22 THE COURT: No, it's particularly -- we are
23 particularly careful about it in Hawaii because in Hawaii when
24 you see somebody that you know or even know very casually, it
25 is considered the worst not to acknowledge them or say hello to

1 them. It's the opposite in New York. When you see somebody,
2 you run to the other side of the street.

3 MR. BART: I'm getting tarred constantly.

4 THE COURT: I remember the days when I represented
5 JCPenney -- off the record.

6 *(Discussion off the record.)*

7 THE COURT: Let's bring the jury back in.

8 * * *

9 *(2:59 p.m.)*

10 COURT SECURITY OFFICER: All rise for the jury.

11 THE COURT: All right. Please be seated.

12 Ladies and gentlemen, at the end of the witness's
13 testimony he was asked a question relative to some of the
14 reasons why Sony had joined in the lawsuit, the reasons why
15 they were participating, and they were concerned about the
16 activities of -- what the witness perceived to be the
17 defendant's activities, and he made a statement, which was his
18 opinion, that the defendants had broken the law.

19 Now, I understand that he was just making a statement
20 predicated on his personal opinion, but you have to understand
21 and disregard that statement entirely, because that is your job
22 here is to make a determination after you hear all of the
23 evidence. And I'm not criticizing the witness, it's a human
24 reaction sometimes. But your job here is to determine whether
25 copyright law has been violated in the ways in which I will

1 instruct you, and that is not the province of a witness. That
2 is your job.

3 It's not even my province, even I don't make that
4 decision. That's your job. You take the law I give you and
5 then you will apply it to the facts as you find them and reach
6 that decision, okay?

7 All right. Okay. No criticism of anybody, just the
8 way it is. All right. You may cross-examine.

9 MR. HOWENSTINE: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. HOWENSTINE:

12 Q. Good afternoon, Mr. Walker.

13 A. Hello.

14 Q. Now, you're a lawyer, correct?

15 A. Yes.

16 Q. And you and your legal team, you oversee all of Sony's
17 antipiracy efforts, is that correct?

18 A. The head of antipiracy reports to me. He oversees
19 antipiracy.

20 Q. And that's Dong Jang, correct?

21 A. Yes.

22 Q. Now, you understand this is a case about copyright
23 infringement allegedly detected by a company called Rightscorp,
24 correct?

25 A. Yes.

1 Q. You understand that Rightscorp sent e-mails to Grande
2 accusing Grande subscribers of copyright infringement?

3 A. I'm not aware of that. I'm aware that they prepared
4 notices that they gave to Grande. I don't know the details.

5 Q. And those were notices that were sent by e-mail to Grande,
6 right? That's your understanding?

7 A. I don't know how they delivered.

8 Q. You don't know that Grande got any notice of copyright
9 infringement?

10 A. No, I know that Grande got notice. I don't know how they
11 got notices.

12 Q. I understand. But you understand that Rightscorp has
13 accused certain of Grande subscribers of committing copyright
14 infringement, correct?

15 A. Yes.

16 Q. And you believe that Grande should have terminated the
17 Internet access of those subscribers who Rightscorp had
18 accused, right?

19 A. No, I believe they were supposed to implement a reasonable
20 repeat infringer policy and determine when it was appropriate
21 to terminate users.

22 Q. And in some circumstances, to terminate them, correct?

23 A. Correct.

24 Q. But only if those accusations were true, right?

25 A. If the accusations were true?

1 Q. Yeah, only if Rightscorp's accusations were true, correct?

2 A. I guess.

3 Q. I mean, are you telling the jury that Grande should have
4 terminated people if Rightscorp's accusations were false?

5 A. I'm just not following. Yeah, if the notices accurately
6 reflected the facts and the users had, in fact, infringed,
7 then, yes, Grande should have terminated users who they deemed
8 to be repeat infringers.

9 Q. How could Grande determine if Rightscorp's accusations were
10 true or not?

11 A. I don't know what ISPs preserve, but I imagine they could
12 check the hash themselves -- I don't know, honestly.

13 Q. So you don't know?

14 A. No.

15 Q. Now, you did refer to the term "hash" when you were
16 testifying earlier.

17 A. Uh-huh.

18 Q. You talked about a hash as being associated with a digital
19 file somehow, is that right?

20 A. Yeah.

21 Q. You were not talking about hashes as they are used in the
22 BitTorrent system, correct?

23 A. I'm using the -- so in fingerprinting, like on social media
24 platforms a hash is typically identified with a sound file and
25 they have a unique hash.

1 Q. So you're not talking about hashes that are used in the
2 BitTorrent protocol, correct?

3 A. I don't -- I don't know.

4 Q. You don't know anything about BitTorrent?

5 A. I mean, I know generally what BitTorrent is.

6 Q. You're not an expert on --

7 A. I'm not -- I'm not a technology expert, no. I'm a lawyer.

8 Q. Now, I believe you testified that there are 453 Sony
9 recordings -- Sony songs, let's say, that are at issue in this
10 lawsuit, is that right?

11 A. That's right.

12 Q. And Sony maintains records of all of the original sound
13 recordings that it owns, correct?

14 A. Yes.

15 Q. Those are called the masters?

16 A. Yes.

17 Q. So Sony keeps the masters, and then it provides a copy of
18 the masters to the Copyright Office when it registers a
19 copyright, right?

20 A. It keep -- yeah. It provides a copy of the recording.

21 Q. So, likewise, Sony could have provided copies of all those
22 original masters so the jury could listen to them, correct?

23 I'm not trying to be tricky. I think it's a simple
24 question.

25 MR. BART: Objection, Your Honor.

1 A. We can provide copies of the recordings for the jury to
2 listen to if that's helpful, yes.

3 Q. So they could do something similar to what you testified
4 about when you said you had listened to some songs allegedly
5 downloaded by Rightscorp, and you compared them to songs owned
6 by Sony, you said, right?

7 A. Yeah. I listened to the same songs on Spotify as the files
8 that were provided to me, that's right.

9 Q. So if the jury had copies of the original songs, they could
10 do the same thing that you did, right?

11 A. You mean the same exercise, just comparing side-by-side the
12 two recordings? Yeah.

13 Q. So, like you said, there are 453 songs in suit. Do you
14 know how -- roughly how many Sony artists that equates to?

15 A. Oh, gosh. There were definitely duplicates in what I
16 listened to, but I don't -- I don't know.

17 Q. Over a hundred, fair to say?

18 A. Yeah, yeah.

19 Q. And I believe that you suggested that Sony's artists have
20 been harmed by copyright infringement on Grande's network.
21 That's your opinion?

22 A. Certainly.

23 Q. Which Sony artist did you ask to come testify about that in
24 this case?

25 MR. BART: Objection, Your Honor.

1 MR. HOWENSTINE: I would respond to the objection if I
2 knew what it was.

3 MR. BART: Well, I'm not supposed to give speaking
4 objections.

5 THE COURT: No, but you can tell me why you're
6 objecting.

7 MR. BART: Because this witness does not make a
8 decision as to who is coming as a witness. He's saying you
9 could have called an artist and asked them to come. It's not
10 the role of this witness.

11 THE COURT: I'm going to sustain the objection for
12 that reason, but you can ask that question in a different way.

13 BY MR. HOWENSTINE:

14 Q. Which Sony artist did you speak to about being harmed by
15 copyright infringement on Grande's network?

16 A. I haven't spoken to any Sony artists about the case.

17 Q. So you testified -- I believe you said -- you were talking
18 about the difficulty of policing infringement, I think, and you
19 said, *"We require the help of a monitoring company to see*
20 *what's happening on the different platforms."* Do you recall
21 that?

22 A. Yes.

23 Q. And when you required that help, Sony has never hired
24 Rightscorp, correct?

25 A. I don't know that we've ever -- I don't know whether we

1 have ever hired Rightscorp.

2 Q. I'm sorry. You are responsible for Sony's antipiracy group
3 and you don't know if you've ever hired Rightscorp?

4 A. The antipiracy team hires many, many, many vendors. And
5 no, I don't know if at any point in time they've hired
6 Rightscorp.

7 Q. You didn't speak to anyone within the company about that
8 before you came and testified today?

9 A. No. I mean, unfortunately, Dong Jang, who's the head of
10 antipiracy, is on paternity leave, so I wasn't able to talk to
11 him.

12 Q. I believe you sit on the board of the RIAA, is that right?

13 A. No.

14 Q. Are you a member of the board of RIAA?

15 A. No.

16 Q. Do you have any role with RIAA?

17 A. I mean, Sony Music certainly participates in the RIAA.
18 It's our trade association.

19 Q. But you personally?

20 A. No. I'm on the board of Sound Exchange.

21 Q. Well, you said that Sony is a member of RIAA --

22 A. Yes.

23 Q. -- correct? So to allow Sony and the other labels to bring
24 this case, RIAA bought e-mails from Rightscorp, correct?

25 A. I'm aware that there was an arrangement between the RIAA

1 and Rightscorp to secure the materials, yes.

2 Q. And RIAA also bought music files that Rightscorp claims to
3 have downloaded from Grande's Internet users. Do you
4 understand that?

5 A. Yes.

6 Q. Do you know how much RIAA is paying Rightscorp for its
7 witnesses to testify at trial?

8 MR. BART: Objection, Your Honor.

9 THE COURT: Well, he's entitled to ask if there are
10 paid witnesses.

11 MR. BART: Yes, but he can ask the witnesses who are
12 being paid instead of asking this person -- this witness.

13 THE COURT: I think you missed the foundation question
14 as to whether he has that knowledge.

15 BY MR. HOWENSTINE:

16 Q. Do you know whether RIAA is paying Rightscorp's witnesses
17 to come and testify at this trial?

18 A. I don't.

19 MR. HOWENSTINE: I'd like to show the witness
20 preadmitted DX 66, Defendant's Exhibit 66. This has already
21 been admitted without objection.

22 THE COURT: Can we dim the lights a little bit so the
23 jury gets a better -- it's a little bright.

24 MR. HOWENSTINE: If we could zoom in on the title in
25 the top four paragraphs.

1 THE COURT: That's right. You have individual
2 monitors, don't you? Forgive the old-school guy, okay? I'm
3 from the days when we used to pass the paper around.

4 BY MR. HOWENSTINE:

5 Q. This is a document titled "Litigation Support and
6 Consulting Agreement," correct?

7 A. Yes.

8 Q. Have you seen this document before?

9 A. No.

10 Q. If you look at the top paragraph, it says, *"This litigation*
11 *support and consulting agreement is made this 19th Day of*
12 *October 2016 by and between Recording Industry Association of*
13 *America and Rightscorp."* See that?

14 A. Yes.

15 Q. Now, so this is the agreement between RIAA and Rightscorp.
16 You would agree with me?

17 MR. BART: Objection, Your Honor. This witness has
18 never seen this document before.

19 THE COURT: Sustained.

20 BY MR. HOWENSTINE:

21 Q. I'd like you to, if you could, move to schedule B, the last
22 page. If you could zoom in on the information there at the
23 top.

24 So this document indicates that Mr. Boswell is being paid
25 \$350 an hour, correct?

1 MR. BART: Objection. Same objection. This witness
2 has never seen the document.

3 THE COURT: You need to ask him more foundation before
4 you start to probe him on the document, counsel.

5 BY MR. HOWENSTINE:

6 Q. What do you know about the relationship between RIAA and
7 Rightscorp?

8 A. I know that Rightscorp provided information to the RIAA. I
9 don't know what the terms are related to that transfer. I know
10 that the RIAA and their experts evaluated separately the
11 technology. That's really the extent of what I know about
12 Rightscorp.

13 Q. Has Sony independently evaluated Rightscorp's technology?

14 A. I don't know. I don't know.

15 Q. We talked about the fact that -- well, I had asked you
16 about whether Sony has ever hired Rightscorp. Do you know if
17 RIAA has ever hired Rightscorp, apart from this agreement?

18 A. I don't know.

19 Q. You don't know if RIAA has ever hired Rightscorp to send
20 copyright infringement complaints to ISPs, for example?

21 A. I don't know.

22 Q. You also testified about different mechanisms by which Sony
23 sells its music or offers its music for sale. You talked about
24 digital downloads was one of those?

25 A. Sure.

1 Q. Certainly, Sony maintains records of digital downloads on a
2 per-song basis, right?

3 A. Yes.

4 Q. So if you wanted to show for the jury, for example, how
5 much a given song is worth, you could show it information about
6 how many times it was sold in digital download form, correct?

7 MR. BART: Objection, Your Honor. Use of the term
8 "worth." It has nothing to do with that.

9 THE COURT: Sustained.

10 BY MR. HOWENSTINE:

11 Q. If you wanted to show to the jury how many times a song had
12 been sold over a digital download platform, you could provide
13 that information, correct?

14 A. We would have that reporting.

15 Q. And, likewise, you could show the jury how many times a
16 given song had been streamed on a streaming service, correct?

17 A. Yes.

18 Q. But you're not able to testify about any of that
19 information today on a per-song basis, correct?

20 A. No. I mean, that's correct.

21 Q. As the person responsible for antipiracy efforts at Sony,
22 is it your view that Grande should spy on what its customers
23 are doing online?

24 MR. BART: Objection, Your Honor. He's already said
25 he is not the head of antipiracy twice.

1 THE COURT: Sustained.

2 BY MR. HOWENSTINE:

3 Q. Is it your view that Grande should spy on what its
4 customers are doing online?

5 A. No. I think the suggestion is that Grande has to respond
6 to notices and share those notices with its users and have a
7 repeat infringement policy that's reasonably implemented to
8 terminate repeat infringers.

9 Q. So in your view, Grande is obligated to take all the
10 notices that it receives at face value, is that correct?

11 A. I mean, I guess so, yes.

12 MR. HOWENSTINE: I have no further questions.

13 THE COURT: All right. Any redirect?

14 MR. BART: No, Your Honor.

15 THE COURT: Okay, sir, you can step down. Thank you.

16 THE WITNESS: Thank you.

17 MR. BART: Thank you, Your Honor. Plaintiffs are
18 calling Wade Leak as their next witness.

19 (3:18 p.m.)

20 COURTROOM DEPUTY CLERK: Please remain standing and
21 raise your right hand.

22 You do solemnly swear the testimony you're about to
23 give in this case now before the Court will be the truth, the
24 whole truth and nothing but the truth, so help you God?

25 THE WITNESS: I do.

1 * * *

2 (WADE LEAK, Plaintiff Witness, Sworn.)

3 * * *

4 COURTROOM DEPUTY CLERK: You can have a seat.

5 DIRECT EXAMINATION

6 BY MR. BART:

7 Q. Good morning. Can you introduce yourself to the jury,
8 please.

9 A. Sure. My name is Wade Leak.

10 Q. By whom are you employed, Mr. Leak?

11 A. What's that?

12 Q. By whom are you employed?

13 A. Sony Music Entertainment.

14 Q. And how long have you worked for Sony Music Entertainment?

15 A. Going on 24 years.

16 Q. And what's your current title?

17 A. I'm the executive vice president, deputy general counsel,
18 and chief compliance ethics and privacy officer.

19 Q. You have to take a deep breath.

20 A. It's a lot, yes.

21 Q. Is Sony Music Entertainment a plaintiff in this case?

22 A. Yes.

23 Q. What are the primary assets of Sony Music Entertainment?

24 A. Our sound recordings.

25 Q. And what does Sony do to protect them?

1 A. We get copyright protection of those sound recordings.

2 Q. And what is a copyright?

3 A. A copyright is like an exclusive legal right that gives you
4 certain protections for a book, a film, sound recording.

5 Q. Okay. And how are copyrights protected?

6 A. Primarily through federal law. The U.S. Constitution makes
7 a reference to copyright, and over time, since the beginning of
8 our country, Congress has enacted different laws to protect
9 copyright.

10 Q. And what does owning a copyright enable the copyright owner
11 to do?

12 MR. HOWENSTINE: Objection, Your Honor. He's asking
13 the witness to testify on the law.

14 THE COURT: Sustained.

15 BY MR. BART:

16 Q. Is there a difference between owning -- okay.

17 As deputy counsel of Sony Music, what rights can Sony
18 exercise -- what rights do you allow Sony to exercise in a work
19 once it has a copyright?

20 A. Once we have the copyright, we have the right to the -- the
21 exclusive right to reproduce the work.

22 MR. HOWENSTINE: Objection, Your Honor. He's going on
23 to testify about the law.

24 THE COURT: No, I don't think so. He's just giving
25 his own personal view.

1 A. We have the --

2 THE COURT: I mean, I think the jury is entitled to
3 understand the basis of his understanding so they can evaluate
4 his testimony. I think the jury understands that I will
5 instruct them on the law of copyright.

6 BY MR. BART:

7 Q. You can continue your answer.

8 A. -- the exclusive right to reproduce the copyrighted work,
9 to distribute the copyrighted work, to publicly perform the
10 copyrighted work, and to make what's known as a derivative work
11 or a work based on that copyrighted work.

12 Q. Is there a difference between owning a copyright and owning
13 a copy of a work?

14 A. Of course.

15 Q. And what's that?

16 A. If you own the copy of a work, you only have the right to
17 enjoy that copy. Potentially maybe resell that copy, but not
18 to do all the other things I mentioned. You don't have the
19 right to reproduce, distribute, etc.

20 Q. Okay. Have the laws -- are copyright laws important to
21 Sony Music?

22 A. Absolutely.

23 Q. And why?

24 A. Because it's the copyright -- it's the protection of our
25 copyrights that our entire business is based upon. We make

1 artistic works with our artists, and the only way we can
2 realize the benefit of those works is through exercising those
3 exclusive copyright rights.

4 Q. Do your responsibilities at Sony Music Entertainment
5 include knowing or investigating what sound recordings the Sony
6 companies own or control?

7 A. Yes.

8 Q. How many of those sound recordings are at issue in this
9 lawsuit?

10 A. There are 453 Sony Music copyrights at issue in this case.

11 Q. Are you familiar with those recordings?

12 A. Yes, generally familiar.

13 Q. How?

14 A. Many of them I'm familiar with them because I know the work
15 behind Sony Music with the artist creating the work. And many
16 I know just because I'm a fan of the music.

17 Q. Are you personally familiar with how the Sony plaintiffs
18 came to own or control these sound recordings?

19 A. Yes. In the course of this case, I helped prepare and
20 signed a sworn statement that presented the basis for all of
21 our ownership and/or exclusive control of the copyrights at
22 issue in this case.

23 Q. Did Sony plaintiffs or their predecessors apply for
24 copyright registration certificates from the Copyright Office
25 for all 453 of these works?

1 A. Yes.

2 Q. Do you know whether they were compiled and produced in this
3 case?

4 A. Yes, we did -- my understanding is we got all that
5 information together and produced it in this case.

6 Q. Okay.

7 MR. BART: Your Honor, this has already been marked, I
8 think this morning, as Plaintiff's Exhibit 22.

9 BY MR. BART:

10 Q. Can you describe them for the jury?

11 A. Do I move this? Can I move this? No. Sorry. I don't
12 know what I'm supposed to do.

13 Q. Just generally --

14 A. My understanding is this is the copyright certificates for
15 the works at issue in this case, the Sony Music works at issue
16 in this case.

17 Q. Now I'd like to show you Plaintiff's Exhibit 21. Have you
18 seen this document before?

19 A. Yes.

20 Q. Can you tell me what it is?

21 A. That's a list of the Sony musical tracks at issue in this
22 case with certain registration information about the
23 copyrights.

24 Q. Okay. And --

25 MR. HOWENSTINE: Excuse me. Has this document been

1 admitted into evidence?

2 MR. BART: I'm getting there. I'm laying a
3 foundation.

4 MR. HOWENSTINE: It's already been published to the
5 jury?

6 THE COURT: Yeah, we really shouldn't publish it until
7 it's been received.

8 MR. BART: I'm sorry. I didn't intend to say publish.
9 I wanted to show him Exhibit 21. And maybe I misspoke.

10 THE COURT: It's all right. I don't think -- it was
11 so small, I don't think anybody could read it anyway. I
12 couldn't.

13 MR. BART: Okay. May I proceed?

14 THE COURT: Yes.

15 COURTROOM DEPUTY CLERK: Judge.

16 *(Discussion held off the record.)*

17 THE COURT: Just let her know what you want to do.

18 MR. BART: Okay.

19 COURTROOM DEPUTY CLERK: You can put it on the screen,
20 but only the witness is going to see it, if that's what your
21 intention is.

22 MR. BART: Right now, because I'm going to move for
23 it --

24 COURTROOM DEPUTY CLERK: Right.

25 MR. BART: -- so I didn't understand the procedure.

1 THE COURT: That's all right. It's a good time.
2 We're early in the trial. We've got a long way to go.

3 MR. BART: Yep, absolutely.

4 THE COURT: So now is the time to get this squared
5 away.

6 MR. BART: Okay.

7 BY MR. BART:

8 Q. Can you tell me what this document is, Mr. Leak?

9 A. Can you make it a little bigger on my screen or not? Okay.
10 Yes. This is a list of the plaintiffs, Sony plaintiffs' works
11 in suit. It has the plaintiff, the artist, the track title,
12 the registration information. That's what this is.

13 Q. And do you know what materials were used as the basis for
14 compiling this chart?

15 A. Our own information and then information from the Copyright
16 Offices's website.

17 MR. BART: I'm going to move to admit this as a
18 summary exhibit under Rule 1006.

19 MR. HOWENSTINE: Objection. Foundation.

20 THE COURT: Did he produce the document?

21 MR. BART: We produced the document on behalf of Sony.

22 THE COURT: No, no, no, I understand, but who put the
23 document together?

24 MR. BART: My law firm put this document together, but
25 it's using just the materials that he identified, which are

1 already part of the record.

2 THE COURT: Are these materials already in evidence?

3 MR. BART: Yes.

4 THE COURT: They're already in evidence, then it's
5 okay.

6 MR. BART: Okay. Thank you, Your Honor.

7 BY MR. BART:

8 Q. I'd like to move on to something else, Mr. Leak. Can the
9 public obtain copies or access to each of the Sony recordings
10 at issue in this case separately without having to purchase or
11 stream an entire album?

12 A. Yes, to my knowledge.

13 Q. Okay. And how can they do that?

14 A. The tracks are available on streaming services like Apple
15 Music, Spotify, and they also can be available on YouTube, many
16 of them.

17 Q. Did Sony make each of these recordings available to the
18 public on an individual basis between 2011 and 2017?

19 MR. HOWENSTINE: Objection. Lack of personal
20 knowledge.

21 THE COURT: Overruled.

22 A. Yes.

23 Q. Were there any --

24 A. Except three. The three that were not available
25 individually are a live recording by Adele of Someone Like Me,

1 a live recording of a Stevie Ray Vaughan track, Crossfire, and
2 a track called Diamonds and Gold by Kid, Inc.

3 MR. BART: I have no further questions, Your Honor.

4 THE COURT: All right. Cross-examination.

5 THE WITNESS: Can I get some water?

6 THE COURT: Sure, of course.

7 THE WITNESS: Thank you.

8 CROSS-EXAMINATION

9 BY MR. HOWENSTINE:

10 Q. I'm sorry, you caught me a little offguard, I didn't think
11 you were going to be so quick.

12 Sorry about that. Mr. Leak, how are you this afternoon?

13 A. I'm fine.

14 Q. Now, you don't know anything about how Rightscorp's system
15 works, correct?

16 A. I don't have personal knowledge of how Rightscorp system
17 works.

18 Q. You've never examined Rightscorp's software system,
19 correct?

20 A. No.

21 Q. Dong Jang is the head of antipiracy at Sony, correct?

22 MR. BART: Your Honor, if this is an extended
23 dissertation to Rightscorp, it is beyond the scope of the
24 direct and I object.

25 THE COURT: You want to re-ask your question.

1 MR. HOWENSTINE: I'll move on, Your Honor.

2 BY MR. HOWENSTINE:

3 Q. So I believe you testified there are 453 Sony sound
4 recordings, songs at issue in this case, correct?

5 A. Yes.

6 Q. If you could put up PX 21 again please?

7 A. I'll definitely need it bigger on my screen. Depending on
8 the questions. Thank you.

9 Q. So let's pick one. Let's go to page eleven of this
10 document. If you could just blow up like the bottom third of
11 this page, the bottom third.

12 Okay. Let's pick a track at random. So we have Chop Me Up
13 by Justin Timberlake there. Do you see that?

14 A. I see that.

15 Q. Now, let's focus on the period of 2014 to 2017. You can't
16 tell the jury anything about how much money Sony earned from
17 people buying that song on iTunes, correct?

18 MR. BART: Objection, Your Honor. I'll give you my
19 reason if you want to.

20 THE COURT: Yeah.

21 MR. BART: Because this is ultimately a discovery
22 issue and there have been discovery rulings and motions with
23 regard to the obligations to produce this type of information
24 and it's being produced in front of the jury as if there is
25 secreting --

1 THE COURT: The objection is sustained.

2 MR. HOWENSTINE: Your Honor, might I request a
3 sidebar?

4 THE COURT: No, you can do it after.

5 BY MR. HOWENSTINE:

6 Q. So Mr. Leak, your testimony today is limited to just the
7 fact that Sony obtained copyright registrations for the songs
8 at issue in this case, correct?

9 A. My testimony is what it was. I don't know if I should
10 characterize it.

11 MR. HOWENSTINE: I don't have any further questions.

12 THE COURT: Do you want to pursue that what you wanted
13 to talk to me at sidebar? I can have him available tomorrow if
14 I change my mind.

15 MR. HOWENSTINE: If we could talk about it right now,
16 I think it will be brief.

17 THE COURT: No. We need to move on. Do you have
18 anything else?

19 MR. BART: No, I don't. I think the witness is going
20 to leave in the morning, though, if that's possible.

21 THE WITNESS: It's my birthday. That's true.

22 THE COURT: An often used excuse.

23 MR. BART: Do you have proof on you?

24 THE WITNESS: I do, I have my driver's license.

25 THE COURT: All right, let's do a sidebar.

1 * * *

2 *(Sidebar.)*

3 MR. HOWENSTINE: Your Honor, I'm not trying to suggest
4 that they had some obligation to come forward with information
5 about digital download sales or anything like that, but one of
6 the factors for statutory damages is the value of the copyright
7 and I'm just trying to establish that there's no evidence in
8 the record from which the jury can determine the value of the
9 copyright, that's it.

10 MR. BART: Your Honor, the record will be what the
11 record will be and there will not be that type of evidence.
12 You can make that argument all you want, the witness --

13 THE COURT: He can ask the witness whether he has any
14 empirical value of the copyrights, Sony copyrights that are at
15 issue. You can ask him that question.

16 MR. BART: I'm not -- that wasn't the question,
17 though, but I agree with you.

18 THE COURT: That's the question you can ask, not the
19 other question.

20 MR. BART: Right, because revenues and values are
21 different things anyway, but the value if you want to ask.

22 THE COURT: You can ask the question.

23 *(Sidebar concluded.)*

24 * * *

25 BY MR. HOWENSTINE:

1 Q. So Mr. Leak, very briefly, we were looking at that PX 21
2 that listed all the Sony songs that are at issue in this
3 lawsuit. Do you recall that?

4 A. Yes.

5 Q. You do not have any information about the empirical value
6 of any of those songs, correct?

7 A. Are you asking about my view of the value of those songs
8 is?

9 Q. I'm asking whether you can provide a specific value for any
10 of those songs.

11 A. I guess the best way to answer that is our catalog is very
12 important to us, all of our tracks have value, the value can be
13 different depending on the time frame you're looking at, but we
14 view them all as valuable.

15 Q. And I'm talking about the specific songs at issue in this
16 lawsuit. And I'm just asking whether you have any information
17 about the empirical value of those particular songs?

18 THE COURT: I think you mean monetary value, is that
19 what you're asking him, monetary value?

20 MR. HOWENSTINE: Yes, yes.

21 THE COURT: Okay.

22 A. The only way I can answer that is what I said, we view all
23 of our tracks as valuable. How much revenue they might
24 generate in a particular time depends on lots of different
25 things, but we view them as -- all of them as valuable and the

1 core of our business, which is what I testified about.

2 Q. And you do not have any information today about how much
3 revenue any of those songs generated, correct?

4 A. I don't have any specific testimony about specific revenue,
5 no.

6 MR. HOWENSTINE: That's all I have, Your Honor.

7 THE COURT: Anything else?

8 MR. BART: No, Your Honor.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: I'll let you get home.

11 THE WITNESS: Thank you very much.

12 MR. TRACER: Plaintiffs call Jeremy Landis.

13 THE COURT: Come forward, sir, and come right around
14 here. And please remain standing and raise your right hand.

15 COURTROOM DEPUTY CLERK: You do solemnly swear the
16 testimony you're about to give in this case now before the
17 Court will be the truth, the whole truth and nothing but the
18 truth, so help you God?

19 THE WITNESS: I do.

20 * * *

21 *(JEREMY LANDIS, Plaintiff Witness, Sworn.)*

22 * * *

23 COURTROOM DEPUTY CLERK: Have a seat.

24 DIRECT EXAMINATION

25 BY MR. TRACER:

1 Q. Good afternoon. Could you please state your name for the
2 jury.

3 A. My name is Jeremy Landis.

4 Q. By whom are you employed, Mr. Landis?

5 A. The Recording Industry Association of America.

6 Q. Does the Recording Industry Association of America have an
7 acronym that it goes by?

8 A. It does, RIAA.

9 Q. How long have you worked at the RIAA?

10 A. A little over 17 years.

11 Q. So that's since about 2004, my math is a little rusty?

12 A. That's right.

13 Q. What's your current title?

14 A. I'm senior vice president of technology.

15 Q. Speaking at a high level, what is the RIAA?

16 A. It's a not-for-profit trade organization that represents
17 recording labels and the recording industry.

18 Q. Who are the members of the RIAA?

19 A. Large recording companies, as well as hundreds of smaller
20 companies.

21 Q. And do they include the plaintiffs in this case?

22 A. They do.

23 Q. Could you list just a few of the things that the RIAA does
24 as a trade association?

25 A. Sure. Antipiracy, legal work, advocacy, market research,

1 golden platinum program.

2 Q. What's the golden platinum program?

3 A. It's a program where we present gold and platinum records
4 to artists that have commercially successful recordings.

5 Q. What are some of your job responsibilities at the RIAA?

6 A. I oversee many initiatives in the Content Protection
7 Department. I oversee a team of five members and we create
8 automated systems for detecting infringement over the Internet
9 as well as maintaining databases of infringement data.

10 Q. Okay. I'd like to talk a little about your background.
11 What was your first job title at the RIAA?

12 A. My first title was analyst.

13 Q. And what department was that in?

14 A. It would have been at the time antipiracy.

15 Q. What was the Antipiracy Department?

16 A. Department that whose mission was to address theft of
17 content online.

18 Q. Does that department still exist?

19 A. It does, but it has a different name now which is Content
20 Protection.

21 Q. About how many people are employed in the now Content
22 Protection Department?

23 A. Seventeen to 20.

24 Q. And how long did you have the job of an analyst in the
25 Antipiracy Department under its former name?

1 A. I think around until 2006.

2 Q. And what are some of the other roles you've had at the RIAA
3 since then?

4 A. I was the university program coordinator, director of
5 online projects, director of information technology and data
6 management, vice president of the technology and now senior
7 vice president of technology.

8 Q. Can you tell us what some kinds of the antipiracy work the
9 RIAA does are?

10 A. I can. We create programs to educate users about the
11 effects of piracy, we investigate websites that engage in
12 infringement and in some cases we file lawsuits on behalf of
13 our members.

14 Q. Are there any other kinds of legal action that the RIAA
15 takes other than lawsuits?

16 A. There are. We send letters to site operators where we find
17 infringement letting them know that there's infringement on
18 their sites and asking them to remove it. We do file lawsuits
19 on behalf of our members and we, in some extreme cases, provide
20 evidence to the Department of Justice.

21 Q. I think you said you send out notice letters. About how
22 many notice letters does the RIAA send in a year?

23 A. Thousands. Many of the notices contain multiple
24 infringements, so we would send notices on millions of
25 infringements during the course of a year.

1 Q. And why does the RIAA do that?

2 A. It's our mission to address piracy wherever we find it.
3 Our members, they rely on being able to monetize their
4 copyrights and so they can invest in new artists and new music.

5 Q. What are the main types of piracy that the RIAA
6 investigates?

7 A. It's changed over the years. Initially there were sites
8 that hosted files that allowed users to download, then the
9 early 2000s online networks came around that allowed users to
10 share files directly with each other. Later there were digital
11 storage sites that we commonly refer to as "lockers" and they
12 would allow users to upload a lot of content and in many cases
13 share that content with other users. Most recently we have
14 stream ripping which takes files from sites like YouTube and
15 makes them shareable.

16 Q. You mentioned online networks in your answer just now. Do
17 those networks have a name that they go by?

18 A. Yes, peer-to-peer or P2P.

19 Q. And what is a P2P network?

20 A. Generally it's an online network of users that allow users
21 to log in -- sorry, not log in, to engage with other users,
22 find files, and download those files directly without the
23 assistance of a third party.

24 Q. And have those networks changed at all over time?

25 A. They have, yes.

1 Q. How?

2 A. There were originally what we refer to as centralized
3 peer-to-peer sharing services like Napster and LimeWire and
4 Grokster. There were companies that distributed the software
5 and they had a centralized organization. Then there was
6 BitTorrent, which was decentralized, it was a piece of software
7 that allowed users to share files.

8 Q. How do these types of networks work?

9 A. Generally speaking, they allow users to see what other --
10 what other users are sharing on a network and to directly
11 download those files.

12 Q. Does the RIAA employ people in the Content Protection
13 Department today who work on piracy issues related to P2P
14 networks?

15 A. Yes, they do.

16 Q. So you've talked a little bit about how P2P networks have
17 changed over time. Is there anything else in your view that
18 distinguishes BitTorrent from the other P2P networks that
19 you've identified?

20 A. There is the decentralized nature of BitTorrent allows
21 users to share multiple pieces of the same file simultaneously
22 which means that a single user can download multiple pieces of
23 the same file at the same time making download speeds faster.

24 Q. Do BitTorrent users know who they're downloading files
25 from?

1 A. No.

2 Q. Does the RIAA monitor BitTorrent?

3 A. We do with the help of a vendor, yes.

4 Q. What do those vendors do?

5 A. Those vendors act as BitTorrent clients and they log the IP
6 addresses of users sharing files.

7 Q. What's an IP address?

8 A. It is a set of numbers assigned to a computer on the
9 Internet, it's a digital address as the name would suggest.

10 Q. Is it possible to identify a specific person on BitTorrent
11 based only on that person's IP address?

12 A. No, it's not.

13 Q. Can anybody do that?

14 A. An Internet service provider could.

15 Q. What do you mean by Internet service provider?

16 A. The company that provides Internet access to a user.

17 Q. Can you give me an example of one?

18 A. Grande, the defendant in this case.

19 Q. So without the cooperation of an Internet service provider,
20 does the RIAA have any means to connect identified
21 infringements to specific users?

22 A. No, we do not.

23 Q. Are the vendors you mentioned able to take any direct
24 actions against users as a result of finding that those users
25 are making files available to download on BitTorrent?

1 A. No, they're not.

2 Q. So what do the monitoring companies do when they identify
3 infringing activity on BitTorrent?

4 A. They log the IP addresses of the user sharing files and
5 they report that information to Internet service providers.

6 Q. And what happens after they report the information to the
7 Internet service providers?

8 A. It's up to the ISP what action to take.

9 Q. Does the RIAA ever acquire any copies of digital audio
10 files that have been downloaded from the suspected infringing
11 websites?

12 A. We do, yes.

13 Q. How do they come to possess those files?

14 A. Sometimes we're provided those files by the vendors.

15 Q. And is the same true for peer-to-peer networks?

16 A. That's correct, yes.

17 Q. And does the RIAA ever try to verify that audio files that
18 it comes to possess are actually copies of copyrighted sound
19 recordings?

20 A. We do, yes, it's a big part of what we do.

21 Q. How do you do that?

22 A. Sometimes we do that just by listening to the files, other
23 times we use software that electronically analyzes the file and
24 compares it to a database of known recordings.

25 Q. Can you give me an example of one of those pieces of

1 software you just described?

2 A. Yes, Audible Magic.

3 Q. What is Audible Magic?

4 A. Audible Magic is a proprietary software that analyzes audio
5 files and compares those files to a database of known
6 recordings.

7 Q. Is Audible Magic well known in the music industry?

8 A. It is, I'd say it's the industry standard.

9 Q. Have you ever used Audible Magic as part of your job duties
10 for the RIAA?

11 A. I have, yes.

12 Q. When was the first time you used it?

13 A. I would say 2006.

14 Q. And how frequently have you used it since then?

15 A. Literally millions of times.

16 Q. And how often do you use it?

17 A. I would say almost on a daily basis.

18 Q. Can you give me an example you can think of when you've
19 used Audible Magic?

20 A. Yes, there were a few years ago a prevalence of the locker
21 sites that I mentioned, we would download files from the locker
22 sites that we believed to be engaged in infringing activity and
23 we would run those files through Audible Magic to determine if
24 they were from company recordings.

25 Q. Can you tell us just examples of some of those locker sites

1 you just mentioned?

2 A. Sure. Mega Upload, Foreshared, Share Beast.

3 Q. And has the RIAA ever taken legal action in reliance on
4 Audible Magic evidence?

5 A. Yes, we have.

6 Q. What kind of legal action?

7 MR. HOWENSTINE: Objection, Your Honor, relevance.

8 THE COURT: Sustained.

9 BY MR. TRACER:

10 Q. Has the RIAA ever relied on Audible Magic evidence to
11 respond to copyright infringement online?

12 MR. HOWENSTINE: Objection. Same objection, Your
13 Honor.

14 THE COURT: Now, that's a slightly different question.
15 I'm going to allow it.

16 A. Yes, we have.

17 Q. What has the RIAA done?

18 A. In example of Share Beast was a online locker service, we
19 download files from the Share Beast service and we used Audible
20 Magic evidence to eventually alert the Department of Justice to
21 activity on the Share Beast service.

22 Q. And what was the result of that sharing information with
23 the government?

24 MR. HOWENSTINE: Objection, relevance again, Your
25 Honor, talking about other litigations.

1 THE COURT: Sustained.

2 BY MR. TRACER:

3 Q. Are you aware of any times the government has ever taken
4 any legal action based on Audible Magic evidence?

5 MR. HOWENSTINE: Same objection.

6 MR. TRACER: Your Honor, this goes to reliability of
7 Audible Magic technology.

8 THE COURT: The objection is overruled.

9 BY MR. TRACER:

10 Q. Are you aware of any times when the government has taken
11 any legal action based on Audible Magic evidence that the RIAA
12 has shared with it?

13 MR. HOWENSTINE: Objection, live personal knowledge,
14 asking about what the government did.

15 MR. TRACER: Based on the evidence that the RIAA
16 provided to it.

17 THE COURT: Well, you need a little more foundation
18 than that.

19 MR. TRACER: Okay.

20 BY MR. TRACER:

21 Q. Are you aware of any public lawsuits that the federal
22 government has brought based on Audible Magic evidence that the
23 RIAA has provided to it?

24 MR. HOWENSTINE: Same objection, Your Honor.

25 THE COURT: Overruled.

1 A. I am, yes.

2 Q. And what actions are you aware of?

3 A. In the case of Share Beast specifically, we provided
4 evidence to the Department of Justice. Department of Justice
5 decided to take action and the operator of Share Beast was
6 sentenced.

7 Q. Can you give me any recent examples of civil lawsuits that
8 the RIAA has pursued based on evidence from Audible Magic?

9 A. I can, yes.

10 MR. HOWENSTINE: Objection, again Your Honor,
11 relevance.

12 MR. TRACER: Again it goes to Audible Magic's
13 reliability.

14 THE COURT: You're right on the outer fringes of this
15 because he doesn't have a lot of personal knowledge about this.
16 He's just reflecting what he knows was transferred, so he
17 doesn't know precisely.

18 MR. TRACER: He's aware of information -- he's aware
19 of what the RIAA has done as an employee of the RIAA.

20 THE COURT: He can testify to that.

21 MR. TRACER: I believe that was my question.

22 THE COURT: I thought you were asking him about
23 something different.

24 MR. TRACER: My question was if there are any -- I'll
25 ask a new question and we'll go from there.

1 THE COURT: All right.

2 BY MR. TRACER:

3 Q. Can you give me any recent examples of civil lawsuits that
4 the RIAA pursued based on evidence it obtained from Audible
5 Magic?

6 MR. HOWENSTINE: Same objection, Your Honor, talking
7 about other lawsuits.

8 THE COURT: Yeah, I want to stay away from other
9 lawsuits. We have enough to deal with here.

10 MR. TRACER: Okay, I'll move on, Your Honor.

11 BY MR. TRACER:

12 Q. Why does the RIAA have a need to use a tool like Audible
13 Magic?

14 A. In many cases there's a vast amount of infringement, this
15 is an electronic tool that helps us save time when identifying
16 recordings.

17 Q. How does it help you save time?

18 A. It's a piece of proprietary software that analyzes the
19 files and matches them to known recordings, it means that we
20 don't have to listen to every file.

21 Q. And how do you use Audible Magic?

22 A. We write some simple code that inputs the files into
23 Audible Magic and records the returns.

24 Q. And in your experience using Audible Magic as part of your
25 employment with the RIAA, have you found its results to be

1 reliable?

2 A. A hundred percent reliable, yes.

3 Q. Have you ever seen any evidence that it made a mistake in
4 matching one sound recording to another?

5 A. No, I have not.

6 Q. Do you know anything about how the Audible Magic software
7 works on a technical level as opposed to get results from it?

8 A. I do not, it's proprietary software.

9 Q. Has that ever stopped you from using Audible Magic?

10 A. No, it has not.

11 Q. Are you familiar with the company called Rightscorp?

12 A. I am, yes.

13 Q. What is your understanding of what Rightscorp does?

14 A. They are a vendor that monitors P2P networks.

15 Q. Does Rightscorp also download audio files on BitTorrent?

16 A. They do.

17 Q. Did there ever come a time when you came to be in
18 possession of material that Rightscorp downloaded from
19 BitTorrent users?

20 A. Yes.

21 Q. When was that?

22 A. Around October of 2016.

23 Q. And what happened then?

24 A. I was provided a hard drive of files by my direct
25 supervisor at the time, Mark McDevitt.

1 Q. What did you do with that hard drive of files?

2 A. I took those files and input them into Audible Magic.

3 Q. At that time, did you know where the audio files came from?

4 A. At that time, no, I did not.

5 Q. But sitting here today, do you have an understanding of
6 where they came from?

7 A. I do, yes.

8 Q. And where is that?

9 A. They were files that were downloaded by Rightscorp --

10 MR. HOWENSTINE: Objection, lack of personal
11 knowledge, Your Honor.

12 THE COURT: Sustained.

13 BY MR. TRACER:

14 Q. Are you familiar with the concept of metadata associated
15 with audio files?

16 A. I am, yes.

17 Q. And what's your understanding of that concept?

18 A. It's factual data in addition to the audio recording that
19 displays information such as the name of an artist, the name of
20 title, potentially the releasing year of recording.

21 Q. What is your understanding of what metadata is typically
22 associated with audio music files?

23 A. That would be the name of the artist, the title of the
24 recording, sometimes the year of the release.

25 Q. Did the audio files on the hard drive that you received

1 have any metadata associated with them?

2 A. They did, yes.

3 Q. How many files were on that hard drive?

4 MR. HOWENSTINE: Objection, foundation, Your Honor.

5 MR. TRACER: Your Honor, he testified that he came to
6 be in possession of the hard drive.

7 THE COURT: The objection is overruled.

8 BY MR. TRACER:

9 Q. How many files were on that hard drive?

10 A. Around 60,000.

11 Q. And did you run all of those files through the Audible
12 Magic program?

13 A. Yes, I did.

14 Q. What were the results?

15 A. There were around 40,000 files that had a match to a
16 recording in the Audible Magic database.

17 Q. When you say a match, what does that mean?

18 MR. HOWENSTINE: Objection, foundation. He's talking
19 about the outputs of software when the inputs are not in
20 evidence.

21 MR. TRACER: Your Honor, he's talking about his use of
22 a software program that he uses as part of his job
23 responsibilities.

24 THE COURT: Objection is overruled.

25 A. Sorry. Can you repeat the question?

1 Q. Yeah. When you said that Audible Magic returned a match,
2 what does that mean?

3 A. It means that for 40,000 files they found a match to a
4 reference file in their database.

5 Q. Are plaintiffs in this case alleging copyright infringement
6 based on any of the files where Audible Magic did not find a
7 match?

8 A. No, they are not.

9 Q. How did you receive the results from the Audible Magic
10 software?

11 A. The Audible Magic software outputs a file. So for every
12 match that we did, a file is output with the results.

13 Q. And did you receive an output file for each of the
14 downloads on the hard drive?

15 A. We did, yes.

16 Q. So I would like to show the witness but not the jury
17 Plaintiff's Exhibit 44, which has not yet been admitted into
18 evidence.

19 Mr. Landis, do you recognize this document?

20 A. I do, yes.

21 Q. What is it?

22 A. It is an example output file from the Audible Magic
23 software.

24 Q. Is this example output file one of the examples from the
25 hard drive we've been discussing?

1 A. It is, yes.

2 Q. Does the RIAA keep this document in its regular course of
3 business?

4 A. Yes, we do.

5 MR. TRACER: I move to admit this exhibit into
6 evidence.

7 MR. HOWENSTINE: No objection.

8 THE COURT: It will be received.

9 MR. TRACER: Can we please publish this to the jury?
10 Thank you.

11 BY MR. TRACER:

12 Q. So is this output file a representative sample of all the
13 output files from Audible Magic that you received on the hard
14 drive?

15 MR. HOWENSTINE: Objection, foundation.

16 THE COURT: You're going to need more foundation, the
17 objection is sustained.

18 BY MR. TRACER:

19 Q. So Mr. Landis, I believe you previously testified that you
20 received an output file for every match that Audible Magic
21 found in its analysis. Do you recall that testimony?

22 A. I do, yes.

23 Q. And this document is one of the output files that you
24 received; is that right?

25 A. That's correct.

1 Q. Okay. Can you walk us through what you look for when you
2 receive an output file like this from Audible Magic?

3 A. I can, yes. Can you please scroll up to the top? Thank
4 you.

5 I would look for the number here, the 2000, that would
6 indicate that Audible Magic successfully received and processed
7 the file. I look for the ID server date that says when the
8 file was processed. I would look for the ID status. In this
9 case, it's 2006 which indicates that Audible Magic found a
10 match. And cases where Audible Magic doesn't find a match,
11 that would be 2005. I also look for the title information. In
12 this case, Just The Way You Are, and the performer information
13 here listed as Bruno Mars. Additionally, I would look at the
14 match offset. Here the number is seven which indicates in the
15 Audible Magic lookup seven seconds of the file were skipped and
16 then I look at the match duration which indicates a match
17 length of 20 seconds.

18 Q. Were you personally involved in collecting all of the
19 Audible Magic output files that you received onto a hard drive?

20 A. I was, yes.

21 MR. TRACER: Your Honor, I'd like to seek admission of
22 Plaintiff's Exhibit 13 which is a thumb drive that contains all
23 of these files. This goes to some of the large voluminous data
24 issues we were discussing earlier.

25 MR. HOWENSTINE: We object, Your Honor. Plaintiff's

1 Exhibit 13 is a collection of 40,000 individual files and I
2 believe they're suggesting that these are the outputs of the
3 Audible Magic software, but they haven't laid any foundation
4 under Rule 9019 that the software is reliable. They haven't
5 laid the foundation of what files Mr. Landis allegedly put into
6 the Audible Magic software to get these outputs. And they
7 haven't laid any foundation of what the database was that
8 Audible Magic had that it compared those files to.

9 MR. TRACER: Your Honor, Mr. Landis has already
10 testified that how he obtained the Audible Magic output files
11 from the hard drive he received and he's testified that he
12 maintains -- that RIAA maintains those files in its regular
13 course of business and he was involved in collecting them for
14 this case.

15 THE COURT: It will be received.

16 MR. TRACER: Thank you, Your Honor. I'd now like to
17 show Mr. Landis, but not the jury, Plaintiff's Exhibit 14.

18 BY MR. TRACER:

19 Q. Do you recognize this document, Mr. Landis?

20 A. I do, yes.

21 Q. What is it?

22 A. It is a summary of the output files of the Audible Magic
23 results.

24 Q. Did you assist in preparing this document?

25 A. I did, yes.

1 Q. And did the RIAA maintain this document in the regular
2 course of its business?

3 A. Yes, it did.

4 MR. TRACER: I move to admit Plaintiff's Exhibit 14.

5 MR. HOWENSTINE: Your Honor, I don't believe there's
6 foundation for where the file name information in this document
7 comes from.

8 THE COURT: I have to agree, the objection is
9 sustained.

10 BY MR. TRACER:

11 Q. Mr. Landis, do you know where the file name information in
12 this document came from?

13 A. Yes, I believe they were the names of the files on the hard
14 drive I received.

15 MR. TRACER: I move again to admit Plaintiff's Exhibit
16 14.

17 THE COURT: It will be received.

18 BY MR. TRACER:

19 Q. Now, Mr. Landis, when we were looking just a few moments
20 ago at the example Audible Magic output file Plaintiff's
21 Exhibit 44, can you identify in this spreadsheet where the
22 information related to that specific output file is located?

23 A. I believe the row is 631.

24 MR. TRACER: Can we focus in on that row please?

25 BY MR. TRACER:

1 Q. Can you tell us what you see in this row?

2 A. I can see the name of the Audible Magic output file which
3 is based on the name of the file on the hard drive for Just The
4 Way You Are.

5 Q. Are you familiar with list of sound recordings the
6 plaintiffs allege were infringed in this case?

7 A. Generally, yes.

8 Q. How many recordings are there?

9 A. I believe 1400, around there.

10 Q. And did you receive an Audible Magic output file match for
11 each of those recordings in the files that you obtained from
12 the hard drive?

13 A. I'm sorry. Please repeat the question.

14 Q. Sure. Did you receive an Audible Magic matching output
15 file for each of the sound recordings when you ran them -- when
16 you ran the files from the hard drive through Audible Magic?

17 A. For the 1400?

18 Q. Yes.

19 A. Yes, I did.

20 Q. And how do you know that?

21 A. The results are indicated here on the spreadsheet.

22 Q. Did you ever conduct an analysis of the plaintiff's works
23 in suit and compare those to the Audible Magic output files you
24 received?

25 A. I did, yes.

1 Q. What were the results of that analysis?

2 A. They matched.

3 Q. I would now like to show Mr. Landis, but not the jury,
4 Plaintiff's Exhibit 15. Do you recognize this document?

5 A. I do, yes.

6 Q. What is it?

7 A. It is a summary of the works in suit, along with the
8 copyright registration numbers and a count of the number of
9 files on the hard drive that correlate to these recordings.

10 Q. Did you participate in the creation of this document?

11 A. I did, yes.

12 MR. TRACER: I move to admit Plaintiff's Exhibit 15
13 into evidence?

14 MR. HOWENSTINE: No objection, Your Honor.

15 THE COURT: It will be received.

16 MR. TRACER: I'd like to publish this to the jury.

17 BY MR. TRACER:

18 Q. Now that the jury can see it, can you just explain again to
19 the jury what this chart shows?

20 A. Yes, it indicates the works in suit of the recordings at
21 issue in this case. The artist name, the track title, the
22 copyright registration number, and the number of copies of that
23 recording found on the hard drive.

24 Q. So we've been talking about the Bruno Mars recording Just
25 The Way You Are, is that recording on this list?

1 A. I believe it is, yes.

2 Q. Turn to page nine of the list. So what is the count for
3 that recording?

4 A. Forty-three.

5 Q. What does that mean?

6 A. That indicates that there were 43 copies of this recording
7 on the hard drive.

8 Q. Now, for the recordings on this list, did you ever compare
9 the data from the Audible Magic output files to the metadata
10 associated with the files themselves?

11 A. I did, yes.

12 Q. And what did you find?

13 A. I found that they matched.

14 Q. What does that mean?

15 A. That means that the artist and title indicated by the
16 Audible Magic software matched the metadata from the Rightscorp
17 hard drive.

18 MR. TRACER: I'd now like to show Mr. Landis, but not
19 the jury, Plaintiff's Exhibit 16.

20 BY MR. TRACER:

21 Q. Do you recognize this document?

22 A. I do, yes.

23 Q. What is it?

24 A. It is a summary of the metadata and the Audible Magic data.

25 Q. And did you help in preparing this document yourself?

1 A. I did, yes.

2 MR. TRACER: I move to admit Plaintiff's Exhibit 16
3 into evidence.

4 MR. HOWENSTINE: Objection, Your Honor. This document
5 contains information from sources other than Mr. Landis, for
6 example, the IP address column ostensibly comes from
7 Rightscorp. The file name column --

8 THE COURT: The objection is sustained. I was
9 concerned about this one.

10 BY MR. TRACER:

11 Q. Mr. Landis, do you know in total how many matching copies
12 of the works in suit were reflected in the Audible Magic output
13 files?

14 A. I believe it was around 19,000.

15 Q. Did you ever do anything to confirm the accuracy of the
16 Audible Magic output files?

17 A. I did at the time. I listened to a small subset of the
18 files.

19 Q. Did you find any errors when you did that work?

20 A. I did not.

21 Q. And since then have you personally listened to any
22 additional audio files from the hard drive?

23 A. I have. In preparation for this testimony, I listened to
24 about 25 recordings.

25 Q. What was your reaction to listening to them?

1 A. I found that they matched.

2 MR. HOWENSTINE: Objection to foundation.

3 THE COURT: Sustained.

4 BY MR. TRACER:

5 Q. Did you do anything to confirm that they matched?

6 A. I did. I listened to the files myself and I also compared
7 them against the recording on Spotify.

8 Q. Are you aware of any examples of Audible Magic saying that
9 a match exists when it doesn't, in other words, a false
10 positive?

11 A. No, I'm not.

12 MR. TRACER: No further questions.

13 THE COURT: Okay.

14 CROSS-EXAMINATION

15 BY MR. HOWENSTINE:

16 Q. So Mr. Landis, you have been involved in discussions within
17 RIAA about the appropriate ways to go about detecting online
18 file sharing, correct?

19 A. I'm not sure I understand what you mean by appropriate
20 ways.

21 Q. Well, I'm talking about methodologically sound ways of
22 determining whether an infringement occurred?

23 A. In general, yes.

24 Q. And you believe that accurately identifying the IP
25 addresses at issue as the source of the suspected infringement

1 is an important component of that, correct?

2 A. It is, yes.

3 Q. And you don't have any information about how Rightscorp
4 identifies suspected IP addresses, correct?

5 A. I don't, no.

6 Q. You also believe that it's important that infringement
7 notices sent by RIAA need to accurately identify infringement,
8 true?

9 A. Accurately identify the infringement by -- sorry, I'm not
10 quite sure the implication there.

11 Q. I was asking you whether you believe that infringement
12 notices sent by RIAA or on behalf of RIAA need to accurately
13 identify infringement, you agree with that?

14 A. Yes, I do.

15 Q. And you personally have not analyzed whether the Rightscorp
16 system can accurately identify infringement, correct?

17 A. I have not.

18 Q. The information in a notice to an ISP needs to be accurate
19 too, right?

20 A. I would agree, yes.

21 Q. And you haven't analyzed whether the information in
22 Rightscorp's notices to Grande is accurate either, correct?

23 A. I have not.

24 Q. You also believe that you need to be confident that the
25 allegedly infringing content identified in a notice is the

1 content that the RIAA believed it to be, right?

2 A. Yes, yes, I do.

3 Q. Now, you testified about a collection of roughly 60,000 MP3
4 files that you received on a hard drive, right?

5 A. 60,000 files, yes.

6 Q. You don't know anything about the origin of those files,
7 correct?

8 A. I don't.

9 Q. Now, you testified that you got approximately 40,000 match
10 conditions for member company sound recordings; is that right?

11 A. I believe I testified 40,000 matches to a recording in the
12 Audible Magic database.

13 Q. So roughly 18,000 of the 60,000 files couldn't be matched
14 to anything in Audible Magic's database, correct?

15 A. The files where there were no match, yes, that's correct.

16 Q. And when you say you got 40,000 matches, that just means
17 it's a song that was in Audible Magic's database, correct?

18 A. That's correct.

19 Q. Doesn't mean it was a song at issue in this lawsuit?

20 A. That's correct.

21 Q. Doesn't mean it's even a song owned by one of the
22 plaintiffs?

23 A. That's correct.

24 Q. Now, I believe you also testified earlier that RIAA sends
25 notices on millions of infringements a year, correct?

1 A. I did, yes.

2 Q. You use a vendor for that, correct?

3 A. For some of them, yes.

4 Q. You use a vendor for the notices you send to ISPs, correct?

5 A. That's correct.

6 Q. Millions of notices?

7 A. As I sit here, I'm not sure of the numbers to ISPs, but we
8 use a vendor for the notices we send to ISPs.

9 Q. And zero of those notices were sent by Rightscorp, correct?

10 A. To the best of my knowledge, yes.

11 MR. HOWENSTINE: I have no further questions for the
12 witness.

13 THE COURT: Anything else, sir?

14 MR. TRACER: Nothing further, Your Honor.

15 THE COURT: All right, sir, you can step down. Thank
16 you.

17 THE WITNESS: Thank you.

18 THE COURT: Well, it's a little late in the afternoon
19 for us to be starting another witness, I think. So ladies and
20 gentlemen, I thank you for your careful attention today and we
21 will be resuming tomorrow morning at 9:00, which means we'd
22 like to have you in the jury room no later than -- when
23 Priscilla?

24 COURTROOM DEPUTY CLERK: 8:15, 8:30.

25 THE COURT: 8:30. Thank you. That's so we can make

1 sure we have everybody.

2 COURT SECURITY OFFICER: All rise for the jury.

3 (4:16 p.m.)

4 THE COURT: You can be seated. Is there anything else
5 counsel would like to take up before we recess this afternoon?

6 MR. BROPHY: I don't believe so, Your Honor.

7 MR. BART: No.

8 THE COURT: Who are your witnesses for tomorrow so
9 that we know?

10 MR. BART: Greg Boswell and Barbara Frederiksen-Cross.

11 THE COURT: Got that?

12 MR. BROPHY: Yes, Your Honor.

13 MR. BART: We had already notified them.

14 MR. BROPHY: We have exchanged information.

15 THE COURT: And you know what I forgot to do? Because
16 nobody reminded me, was to tell the jury --

17 MR. BROPHY: Sorry, I didn't know when the opportunity
18 would present itself.

19 THE COURT: Oh, well. What can you say? I'll tell
20 them tomorrow, I promise I will. Thank you. Have a good
21 evening.

22 (4:18 p.m.)

23 * * *

24

25

* * * * *

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: November 3, 2022

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter
262 West Nueva Street
San Antonio, Texas 78207
(210) 244-5048